83-1310

No._____

Office - Supreme Court, U.S.
FILED
FEB 6 1984
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1983

EDWARD T. YOUNG, JR., WILLOWS WATER DISTRICT, SOUTH CHERRY CREEK LAND COMPANY, SMOKEY HILLS LAND COMPANY, EAST CHERRY VALLEY WATER AND SANITATION DISTRICT, ADOLPH COORS COMPANY,

Petitioners,

vs.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF COLORADO

GLENN G. SAUNDERS
MELVIN B. SABEY
DEBORAH L. FREEMAN
of SAUNDERS, SNYDER, ROSS & DICKSON, P.C.

303 East Seventeenth Avenue
Denver, Colorado 80203
(303) 861-8200

Attorneys for Petitioners

February, 1984

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED

1. Whether the Colorado Supreme Court can destroy the rights of the federal government and its patentees to the nontributary ground water underlying the owners' lands?

2. Whether the Colorado Supreme Court can defeat the constitutional prohibition against taking property without due process by asserting that the water rights never existed in the face of its unequivocal affirmation of the rights twenty years earlier?

3. Whether the Colorado Supreme Court has impaired the obligations of contracts by declaring, after twenty years of reliance upon its property doctrines, that purchasers of land did not, as its rulings had earlier stated, acquire a right to the nontributary ground water beneath the land?

PARTIES

The parties to the proceeding before the Supreme Court of the State of Colorado include:

STATE OF COLORADO, DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WATER RESOURCES, STATE ENGINEER; JOHN HUSTON, ALAN LEAFFER, and WALLACE YAFFE, d/b/a BLUEPOND ASSOCIATES, STONYBROOKE ASSOCIATES, TASKMASTER TRUST, WET ROCK TRUST, TROUT CREEK ASSOCIATES, DEXTER ENTERPRISES, AMITY ASSOCIATES, TABERNASH ASSOCIATES, NEW COLORADO ASSOCIATES, NEW ARIES ASSOCIATES, CONSUMER VENTURES, MARKLINE VENTURES, TRIDENT MESA VENTURES, PARADOX ASSOCIATES, ELK CREEK VENTURES, KADOTA ENTERPRISES, EAST PARK ASSOCIATES, STARGLAZE ENTERPRISES, PURIROSE ASSOCIATES and HARLAN-BISMUTH ASSOCIATES; CF&I STEEL CORPORATION; TRUJILLO CREEK CATTLE COMPANY; and OPEN CIRCLE N RANCH; COLORADO PACIFIC AZTEC; COLORADO PACIFIC ENERGY; NEDLOG TECHNOLOGY GROUP; AMAX, INC.; CITY OF ARVADA; BANKER'S TRUST; CITY OF BOULDER; COLORADO-UTE ELECTRIC ASSOCIATION, INC.; DENVER SOUTHEAST SUBURBAN WATER AND SANITATION DISTRICT, DOUGLAS PARK, LTD.; CITY OF FEDERAL HEIGHTS; GENESSEE WATER AND SANITATION DISTRICT; HIGHLAND DITCH COMPANY; INVERNESS WATER AND SANITATION DISTRICT; ROBERT D. LINDNER; MARATHON OIL COMPANY; MISSION VIEJO COMPANY; SOUTH ADAMS COUNTY WATER AND SANITATION DISTRICT; GOLF HOST

WEST, INC.; THUNDERBIRD WATER AND SANITATION DISTRICT; TRAILWOOD NORTH; CITY OF TRINIDAD; UNION OIL COMPANY; ADAMS RIB RANCH CORPORATION; ATLANTIC RICHFIELD COMPANY; BLACKLAND PROPERTIES, INC.; CHEVRON SHALE OIL COMPANY; CHEVRON U.S.A., INC.; J. RATHBONE FALCK; GOLDSMITH METROPOLITAN DISTRICT; ROBERT KNAPP; KOPPERS COMPANY, INC.; NU-WEST DEVELOPMENT CORP.; ROY H. OTT, JR.; RIO GRANDE WATER USERS ASSOCIATION; STERNS-ROGER CORPORATION; VALLEY COUNTRY CLUB; CITY OF WESTMINISTER; BOB JOHNSTON, JR.; AZL RESOURCES, INC.; THE BESSEMER IRRIGATION DITCH COMPANY; CHEROKEE WATER DISTRICT; CIMARRON CORPORATION; CITY OF FOUNTAIN; COPPA CATTLE COMPANY; SWEETWATER DEVELOPMENT COMPANY; ADOLPH COORS COMPANY; CAROLYN ALLABASHI; AMERICAN MEDICAL CENTER; ARAPAHOE COUNTY AIRPORT; BEAR CREEK DEVELOPMENT COMPANY; BRANNAN SAND AND GRAVEL; DANIEL F. BURNS; CHERRY HILLS COUNTRY CLUB; DENVER TURF FARMS; LESTER A. DIXON; BRUCE DIXON; JOANN DIXON HANSEN; EAST CHERRY VALLEY WATER AND SANITATION DISTRICT; ALFREDA GUY; HEWLETT-PACKARD; JOHN MADDEN COMPANY; CITY OF LOVELAND; LOVELAND READY MIX CONCRETE COMPANY; LEONARD LOUKONEN; REINO LOUKONEN; TOWN OF LYONS; W. EVERT MELLEMA; ORR CONSTRUCTION COMPANY; PENTA, INC.; PERRY PINE AREA HOMEOWNERS; PORTER MEMORIAL HOSPITAL; PRESBYTERIAN MEDICAL CENTER; RICHLAWN TURF FARMS, INC.; SMOKEY HILLS LAND COM-

PANY; SOUTH CHERRY CREEK LAND COMPANY; WALTER STONEHOCKER; SWEDISH MEDICAL CENTER; JOSEPH B. THOMAS; WILLOWS WATER DISTRICT; WOODSIDE LTD.; YMCA OF THE ROCKIES; EDWARD T. YOUNG, JR.; SOUTHWEST PROPERTIES; COPPER MOUNTAIN and COPPER MOUNTAIN WATER AND SANITATION DISTRICT; NINE MILE RANCH; PETER JAFFE; BIG ELK MEADOWS ASSOCIATION; CITY AND COUNTY OF DENVER BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS; CITY OF WHEAT RIDGE and TOWN OF BRECKENRIDGE; UNITED STATES OF AMERICA; PARADISE OIL, WATER and LAND DEVELOPMENT, INC.;

Appellants and Cross-Appellees,

vs.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT; SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT; COLORADO RIVER WATER CONSERVATION DISTRICT; GLEN SCHMIDT; BETTY JO SCHMIDT; JACK E. SCHMIDT; BENTON LAND AND LIVESTOCK COMPANY; MERRIL HASTINGS and BEN WURTSMITH; STONE CREEK COMPANY; GROUSE MOUNTAIN AT VAIL, LTD.; EAGLE-VAIL METROPOLITAN DISTRICT; BENCHMARK AT BEAVER CREEK; AVON METROPOLITAN DISTRICT; FRED GREEN; JUNE CREEK RANCH COMPANY; CRESTED BUTTE WATER AND SANITATION DISTRICT; LEONARD HORN; HIGH PLAINS WATER USERS ASSOCIATION;

Appellees and Cross-Appellants,

and

NORTHERN COLORADO WATER CONSERVANCY

DISTRICT; MUNICIPAL SUBDISTRICT NORTHERN COLORADO WATER CONSERVANCY DISTRICT; E. I. DuPONT deNEMOURS & CO.; ENSIGN BICKFORD COMPANY; COLORADO WATER PROTECTIVE AND DEVELOPMENT ASSOCIATION; PURGATOIRE RIVER WATER CONSERVANCY DISTRICT; JOHN T. OXLEY; ELYSIAN CORPORATION; KEYSTONE, a division of RALSTON-PURINA COMPANY, a Missouri corporation; THE NEW JERSEY ZINC COMPANY, a division of G.W. NATURAL RESOURCES GROUP; LAZY EH RANCH; L.P.E. ESTATES, INC. as successor in interest to EAST PARK, INC.; LINCOLN PROPERTY COMPANY; UPPER YAMPA WATER CONSERVANCY DISTRICT; COUNTY OF ROUTT, COLORADO; PERRY PARK WATER AND SANITATION DISTRICT; CACHE LaPOUDRE WATER USERS ASSOCIATION; JACKSON COUNTY WATER CONSERVANCY DISTRICT; THE CITY OF FORT COLLINS, COLORADO; THOMPSON WATER USERS ASSOCIATION; THE CITY OF BRIGHTON, COLORADO; CITY OF GOLDEN; FRED G. KNIGHT; CURTIS H. CASTLEMAN; A. KALTENBACK; PERRY PARK PROPERTIES, INC.; ROYAL CREST JERSEY FARMS, INC.; WHEATON COLLEGE; LINCOLN PARK WEST METROPOLITAN DISTRICT; ANNUITY BOARD OF THE SOUTHERN BAPTIST CONVENTION; WJ LAND & CATTLE CO.; PUBLIC SERVICE COMPANY OF COLORADO; VIDLER TUNNEL WATER CO.; TERRACOR; SOUTH SUBURBAN METROPOLITAN RECREATION AND PARK DISTRICT; TOWN OF CASTLE ROCK; F. B. ROOKE & SONS; CHESS-SHOEMAKER RANCHES, INC.; J. FRANK; HAZEL J. DILLEY; ARTHUR W. DILLEY and LAURIN DILLEY d/b/a A. W. DILLEY & CO.; JOHN E. and MABLE M. WILSON; JIM and ANN LIKE; C.

ROY and BENETA CANTERBURY; J. GOLDEN BAIR; CITY OF NORTHGLENN, COLORADO; GEORGE R. WEBSTER; ELIZABETH M. WEBSTER; CITY OF ASPEN, COLORADO; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PITKIN, COLORADO; THE HOLBROOK MUTUAL IRRIGATING COMPANY; THE LAS ANIMAS CONSOLIDATED CANAL COMPANY; TOWN OF LaVETA, COLORADO; COUNTY OF KIOWA, COLORADO; AVONDALE WATER & SANITATION DISTRICT; ST. CHARLES MESA WATER ASSOCIATION; COLORADO CITY WATER & SANITATION DISTRICT a/k/a COLORADO CITY METROPOLITAN DISTRICT; SALT CREEK WATER & SANITATION DISTRICT; PUEBLO WEST METROPOLITAN DISTRICT; GREENHORN MOUNTAIN WATER ASSOCIATION, INC.; ARKANSAS VALLEY DITCH ASSOCIATION; LOWER ARKANSAS VALLEY COUNCIL OF GOVERNMENTS; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OTERO, COLORADO; CITY OF ROCKY FORD, COLORADO; TOWN OF CHERAW, COLORADO; WEST GRAND VALLEY WATER COMPANY; SOUTH SWINK WATER COMPANY; VALLEY WATER COMPANY; BENT'S FORT WATER COMPANY; EUREKA WATER COMPANY; HILLTOP WATER COMPANY; PATTERSON VALLEY WATER COMPANY; EAST END WATER COMPANY; WEST HOLBROOK WATER COMPANY; FAYETTE WATER ASSOCIATION; SOUTH SIDE WATER COMPANY; BEEHIVE WATER COMPANY; SCHLEGEL WATER COMPANY; RIVERSIDE WATER COMPANY; HANCOCK WATER COMPANY; NEWDALE-GRAND VALLEY WATER COMPANY; VROMAN WATER COMPANY; TUCKER FARMS; TOWN OF SWINK, COLORADO; TOWN OF MANZA-

NOLA, COLORADO; HOLBROOK CENTER WATER COMPANY; TIMBERLAKE GRAZING ASSOCIATION; 96 PIPELINE COMPANY; WILHELM FEEDLOTS, INC.; H.G. ISBILL; ELEANOR L. ISBILL; CITY OF GRAND JUNCTION; MARIE SCOTT; LORRAINE HARNEY; CHARLES SCUDDER; ELIZABETH A. SCUDDER; HOLLY SCUDDER DIFANI; JEAN SCUDDER; CAROLYN MILLER; RICHARD B. SCUDDER; BIJOU IRRIGATION COMPANY; BIJOU IRRIGATION DISTRICT; RIVERSIDE IRRIGATION COMPANY; RIVERSIDE IRRIGATION DISTRICT; JACKSON LAKE COMPANY; FT. MORGAN RESERVOIR AND IRRIGATION COMPANY; WELDON VALLEY DITCH COMPANY; DUEUL AND SNYDER DITCH COMPANY; SNYDER-SMITH DITCH COMPANY; JOHNSON-EDWARDS COMPANY; TREMONT DITCH COMPANY; LOWER PLATT AND BEAVER DITCH COMPANY; UNION MUTUAL DITCH COMPANY; TETSEL DITCH COMPANY; BRUSH CREEK AND EAGLE RIVER COMPANY; COUNTY OF PARK, COLORADO; THE FARMERS RESERVOIR & IRRIGATION COMPANY; AMITY MUTUAL IRRIGATION COMPANY; DISTRICT 67 IRRIGATION CANALS ASSOCIATION; TOWN OF FAIRPLAY, COLORADO; WATER IN OUR WELLS (W.O.W.); WAYLAND PHILLIPS; CHERRY CREEK DISTRICT #5; CITY OF GREELEY; WATER & SEWER BOARD OF THE CITY OF GREELEY; WESTERN WATER RESOURCES; PHILLIPS 1527; TECHTRACK; NEW LEAF NURSERY; CATHERINE H. ANDERSON; ARAPAHOE WATER & SANITATION DISTRICT; BANCROFT WATER & SANITATION DISTRICT; BELLVIEW GREEN LTD.; BOX ELDER WATER & SANITATION DISTRICT; CASTLE PINES METRO-

POLITAN DISTRICT; GREENWOOD PLAZA WATER DISTRICT; SILVER HEIGHTS WATER & SANITATION DISTRICT; PINE MEADOW TREE FARM; COUNTRY HOMES LAND COMPANY; COLUMBINE LAKE WATER & SANITATION DISTRICT; VAIL INTERMOUNTAIN WATER DISTRICT; DURANGO SKI CORPORATION; PURGATORY WATER & SANITATION DISTRICT; FT. LYON CANAL COMPANY; SPADY BROTHERS; RIVER CANYON RANCH COMPANY; TITAN ROAD I LAND INVESTMENT COMPANY; HAROLD F. HURST; SHEILA K. PRIMM HURST; DONALD ROSSI; OLGA SAFRANEK; ROBERT J. SAFRANEK; ALAN SAFRANEK; ROSANN SAFRANEK; BUFFALO PARK DEVELOPMENT COMPANY; CASTLE OAKS CORPORATION; F. BURR BETTS; CHARLES B. HENDERSON; STEAMBOAT LAKE WATER DISTRICT; UPPER ARKANSAS WATER CONSERVANCY DISTRICT; GEORGE C. CAMILLI; NEIL J. DAVIDSON; HASTY WATER COMPANY, INC.; McCLAVE WATER ASSOCIATION, INC.; MAY VALLEY WATER ASSOCIATION, INC.; EMERY CASS; BERNICE CASS; BENT COUNTY FARM BUREAU; ROUTT COUNTY CATTLEMEN'S ASSOCIATION; ELK RIVER CITIZEN'S ASSOCIATION; FORREST WARREN; M.W. CARVER; WILLIAM B. MAY; RAYMOND GRAY; JOHN E. SANDELIN; IVA CATHERINE SANDELIN; RICHARD P. WARRICK; FLORENCE E. WARRICK; EDWARD B. COUGHLIN; JOHN SMARTT RANCH, INC.; HARLEY J. KOELLER; WESLEY SPLITTER; BUFFALO MUTUAL IRRIGATION COMPANY; HENRY CLAY KIMBROUGH; HERB REYHER, d/b/a REYHER ENTERPRISES, INC.; LA PLATA WATER CONSERVANCY DISTRICT; PINE RIVER IRRIGATION

DISTRICT; DOLORES WATER CONSERVANCY DISTRICT; MANCOS WATER CONSERVANCY DISTRICT; SAN MIGUEL WATER CONSERVANCY DISTRICT; SUMMIT IRRIGATION AND RESERVOIR COMPANY; F&I SCOTT & CO.; JOHN SCHMITT; ROBERT K. TAYLOR; ARTHUR ISGAR; CHARLES M. ROGERS; NOLAND ALEXANDER; RODGER IVES; TOM GILLILAND; CHARLES M. McAFEE; FLORIDA WATER CONSERVANCY DISTRICT; CITY OF COLORADO SPRINGS; CITY OF AURORA; THE CONSOLIDATED MUTUAL WATER CO.; DOUGLAS COUNTY SCHOOL DISTRICT RE-1; LUCAS WILSON; RONALD KIRBY; FRANK SATTERFIELD; CITY OF THORNTON BY ITS UTILITIES BOARD; MOUNTAIN STATES LEGAL FOUNDATION; COMMITTEE TO DEFEND YOUR PRIVATE WATER; DEAN A. STONE; DAVID L. THOMPSON; COUNTY OF EAGLE, COLORADO; VAIL ASSOCIATES, INC.; BEAVER CREEK METROPOLITAN DISTRICT; NICK ALFRED STRUBI; RUTH H. BROWN; TWIN LAKES RESERVOIR AND CANAL CO.; BRUSH CREEK AND EAGLE RIVER COMPANY; TOWN OF EAGLE, COLORADO; VAIL VILLAGE WEST WATER & SANITATION DISTRICT; UPPER GUNNISON WATER PROTECTION AUTHORITY, INC., a Colorado corporation; DR. ROBERT G. WILLEY; DR. RUTH L. WILLEY; SODERQUIST RANCHES, INC., a Colorado corporation; ALBERT MAURER; RUBY MAURER; RUSSELL COLLINS; FRANK MEAKER and SONS; JERRY and DOROTHY DENISON; JIM LAZZERI; JOHN R. LONG; TOWN OF CRESTED BUTTE, COLORADO, a Municipal corporation; ALVIN O. BERG; VERA BERG; JOHN W. NEMANIC; JOSEPH M. NEMANIC; LYLE T. McNEILL; MILDRED McNEILL; WILLIAM C.

DAVIS; MARCELLA DAVIS; RIVERBEND HOMEOWNERS' ASSOCIATION, INC., a Colorado corporation; RIVERBEND SUBDIVISION; JOHN W. LILL; MARY HELEN LILL; E.L. HILT; V. PAULINE HILT; DOS RIOS RANCHES, INC., a Colorado corporation; FLETCHER CORPORATION, a Colorado corporation; LANDS END CO., a Colorado corporation; P.D. SAMS; P&J VADER RANCH, a partnership; GERTRUDE VADER; JACK McLAIN; LOUISE McLAIN; PAUL H. VADER; ANNE MARIE VADER; DUANE PHELPS; DONNA P. PHELPS; RICHARD MARK VADER; JEAN LEE VADER; HARRY D. VADER; INA FAY VADER; DAN I. VADER; LETHA VADER; TRIANGLE 2 RANCH, a Colorado corporation; COLLARD LAND CO., a Colorado corporation; PAUL NICHOLAS; AUGUST NICHOLAS; CLIFTON WOODS; KEITH F. LEWIS; ROBERT BULLINGTON; OCTAVE NICHOLAS; ESTEN B. ORME; NICK H. GRAY; BRUTON ESTATE; LEE R. HAWKS; BUTTE ROCK RANCHES, INC., a Colorado corporation; TOWN OF LAKE CITY, COLORADO, a municipal corporation; KEITH HEGARTY; SHARON D. HEGARTY; JUNE E. FULTON; HELEN FULTON; DAVID FULTON; CRESTED BUTTE WATER AND SANITATION DISTRICT, a Colorado corporation; THE CORPORATION OF ROCKY MOUNTAIN BIOLOGICAL LABORATORY AT GOTHIC, a Colorado corporation;

Appellees.

TABLE OF CONTENTS

	Pages
Questions Presented	i
Parties	ii
Citations to Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions	2
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	18

TABLE OF AUTHORITIES

CASES:

Bonelli Cattle Co. v. State, 414 U.S. 313 (1973), rev'd, Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 6, 9, 18

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 11

Continental Supply Co. v. Abell, 95 Mont. 148, 24 P.2d 133 (1933) 17

Ghione v. State, 26 Wash.2d 635, 175 P.2d 955 (1946) 6, 8

Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) 17

Hann v. City of Clinton, 131 F.2d 978 (10th Cir. 1942) 16

Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) 16

Hughes v. State, 389 U.S. 290 (1967) 5, 6, 8, 9, 14, 18

TABLE OF AUTHORITIES—Continued

	Pages
State v. Southwestern Colorado Water Conservancy Dist., 671 P.2d 1294 (Colo. 1983) (Huston)	*passim*
Stonewall Estates v. CF&I Steel Corp., 197 Colo. 255, 592 P.2d 1318 (1979)	3, 13
United States v. Alexander, 148 U.S. 186 (1893)	9
Whitten v. Coit, 153 Colo. 157, 385 P.2d 131 (1963)	3, 12, 13, 14, 17, 18
CONSTITUTIONAL PROVISIONS:	
U.S. CONST. amend. V	16
U.S. CONST. amend. XIV, § 1	16
U.S. CONST. art. 1, § 10	16
STATUTES:	
ACT of 1866, ch. 262, § 9, 14 Stat. 253 (currently codified at 30 U.S.C. § 51)	10
DESERT LAND ACT OF 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. § 321)	11

No._____

In The

Supreme Court of the United States

October Term, 1983

EDWARD T. YOUNG, JR., WILLOWS WATER DISTRICT, SOUTH CHERRY CREEK LAND COMPANY, SMOKEY HILLS LAND COMPANY, EAST CHERRY VALLEY WATER AND SANITATION DISTRICT, ADOLPH COORS COMPANY,

Petitioners,

vs.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF COLORADO

CITATIONS TO OPINIONS BELOW

The Special Water Judge's Ruling, Judgment and Certification to the Colorado Supreme Court, printed in Appendix A, is unreported. The Final judgment and Opinion entered by the Colorado Supreme Court on appeal, as modified and supplemented on denial of rehearing, is reported at 671 P.2d 1294 (Colo. 1983), and is set forth in Appendix B.

JURISDICTION

The original Opinion of the Colorado Supreme Court was entered July 18, 1983. By Order entered July 29, 1983, the Court extended the time within which Petitions for Rehearing could be filed, to October 3, 1983. Petitioners' Petition for Rehearing was filed October 3, 1983. On November 7, 1983, the Colorado Supreme Court modified and supplemented its Opinion and denied all Petitions for Rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Citations to pertinent constitutional and statutory provisions are set forth in the Table of Contents, *supra*. The text of such provisions is published in Appendix C.

STATEMENT OF THE CASE

Historical Background

The facts material to the consideration of the questions presented in this case commence with acquisition by the federal government of land which now comprises the State of Colorado. By the Louisiana Purchase, a treaty with Spain, a cession from Mexico and a purchase from Texas, the United States acquired all of the land which now comprises the State of Colorado. Commencing in

1862, the public lands were released for settlement and private ownership. Private owners, acquiring government patents to land, acquired the common law right to the ground water lying beneath the land.

In 1963 the Colorado Supreme Court, in *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963), gave unequivocable judicial recognition of the right of a landowner to the nontributary ground water beneath his land, stating that the landowner has a vested property right in the water in his soil and that water not tributary to any public stream is private property. The court also noted the long-recognized right of farmers to sink wells on their farms to make reasonable use of the ground water. In the decision which is the subject of this appeal, commonly referred to as the *Huston* decision—after John Huston, one of the initial applicants—the Colorado Supreme Court also noted the practice of drilling wells for the withdrawal of nontributary ground water and recognized the "substantial" number of such wells. Appendix B, n. 27. As recently as 1979, the Colorado Supreme Court in *Stonewall Estates v. CF&I Steel Corp.*, 197 Colo. 255, 258, 592 P.2d 1318, 1320 (1979), apparently reaffirmed its previously stated doctrine governing the right to nontributary ground water.

In its decision in this case, the Colorado Supreme Court has suddenly repudiated the doctrine it confirmed in *Whitten*, has denied private ownership of nontributary ground water, has asserted a severance of the right to nontributary ground water from the ownership of land, and has declared that the resource is public property, subject to the plenary control of the state legislature.

The *Huston* decision potentially impacts every landowner in the State of Colorado, including the federal government. Through the process of patenting and other federal conveyances, the United States has disposed of approximately 55 million acres of land within the state, but has retained approximately 45 million acres. Department of Interior, PUBLIC LAND STATISTICS 9 (1982). All owners of the 55% of those lands held in private ownership trace title through a chain originating with the federal government. The impact of the *Huston* decision is evidenced by the appearance of hundreds of parties, listed in several pages of caption, the value of whose water rights is in the billions of dollars. Petitioners here are all landowners who seek to protect their water rights.

Procedural History

The complete procedural history of this case is set forth in the Opinion of the Colorado Supreme Court, Appendix B. History particularly relevant to this appeal is set forth briefly hereafter. In December of 1978 several groups of claimants filed applications for determinations of water rights in Colorado. Because there were questions of law basic to the disposition of all of the applications, the Colorado Supreme Court consolidated the cases and assigned a Special Water Judge the responsibility of resolving those basic questions of law. The threshold question submitted to the Special Water Judge was whether nontributary waters in Colorado are subject to appropriation. The Judge was directed to answer additional questions in the event that he ruled affirmatively on the threshold question. The Special Water Judge, acting as an officer of the Supreme Court entered a ruling and judgment which was certified to the Supreme Court for its

further consideration. At the Supreme Court, all issues were thoroughly briefed. In the Opening Brief, Reply Brief, Petition For Rehearing and Petition For Further Consideration which were filed on behalf of petitioners herein, the issues relating to ownership of nontributary ground water and the constitutional prohibitions against taking such property without due process and against impairment of the obligation of contracts were raised for that court's consideration. The fact that Colorado landowners acquired rights to nontributary ground water beneath their land through federal patents to which they trace the origin of their title was also presented to the court. The court resolved all these issues by finding that the federal government had severed all water rights from the land, that private rights to nontributary water never existed and that they therefore were not subject to the protection of the constitution.

REASONS FOR GRANTING THE WRIT

I. The Colorado Supreme Court's Huston Decision Destroys Vested Rights Of The Federal Government And Its Patentees, And Results In An Unconstitutional Taking Of The Property Which Landowners In Colorado Have In The Nontributary Ground Water Contained In Their Soil.

A. The Opinion of the Colorado Supreme Court in Huston is repugnant to this Court's decision in Hughes v. State.

In *Hughes v. State*, 389 U.S. 290 (1967), this Court granted certiorari to review, and reversed, the decision of a state supreme court on grounds which are factually and legally indistinguishable from those now presented in this writ. Therein, the owner of ocean-front property in the state of Washington, who traced her title to a

federal patent prior to statehood, instituted an action against the state to determine whether the right of adjoining landowners to gradual accretions, which existed under the common law prior to statehood, was abolished by a provision of the state constitution. The Washington Supreme Court had addressed this issue twenty years earlier in *Ghione v. State,* 26 Wash.2d 635, 175 P.2d (1946). In that case, the Court held that in spite of the 1889 constitutional provision, title to accretions vested in the owner of the adjoining land. Now, in the *Hughes* case the Washington court faced the same issue. This time, it held that this issue was controlled by state law and that, when Washington became a state in 1889, future accretions were by its constitution reserved for the public domain and private rights therein were terminated.

On certiorari, the Supreme Court of the United States reversed, and held that federal rather than state law was controlling and that, under federal law, title to gradual accretions vested in the adjoining landowner. Mr. Justice Stewart concurred with the decision and reasoning of the Court, but added a thorough analysis of the due process issue raised by the case. The reasoning contained in that analysis was so compelling that six years later, the seven member majority issued a warning concerning the taking issue, citing the very words of Mr. Justice Stewart's concurring opinion. *See Bonelli Cattle Co. v. State,* 414 U.S. 313, 331 (1973), rev'd on other grounds, *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977). Because that opinion so thoroughly analyzed the points at issue here, it is recommended to the Court in its entirety and is quoted extensively hereafter.

In his concurring opinion, Mr. Justice Stewart agreed that the extent of the federal grant to which plaintiff traced her ownership was originally measurable by federal common law. He emphasized, however, that the state supreme court had now ruled that private rights to ocean-front accretions were terminated when Washington became a state, and that the plaintiff could not claim immunity from changes in the property law of the state simply because her title derived from a federal grant. Mr. Justice Stewart was nevertheless quick to caution that "[l]ike any other property owner . . . [the plaintiff could] insist, quite apart from the federal origin of her title, that the State not take her land without just compensation." *Id.* at 535. Mr. Justice Stewart continued:

> [A] conclusion by the State's highest court on a question of state law would ordinarily bind this Court, but here the state and federal questions are inextricably intertwined. For if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of the decision now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966.
>
> We cannot resolve the federal question whether there has been such a taking without first making a determination of our own as to who owned the seashore accretions between 1889 and 1966. • • • For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. [citations omitted]. The Washington court insisted that its decision was 'not startling.' [cita-

> tion omitted]. What is at issue here is the accuracy of that characterization.

Id. at 535-36. As noted above, the Supreme Court of Washington had previously held, in *Ghione v. State*, that title to accretions under Washington law vested in the owner of the adjoining land in years subsequent to, as well as before, statehood. Hence, the decision in *Hughes*, some twenty years later, effected an unforeseen change in Washington property law as expounded by the state supreme court. Mr. Justice Stewart concluded:

> There can be little doubt about the impact of that change upon [the plaintiff]: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property — without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

Id. at 536.

The seriousness of the constitutional concerns voiced in the *Hughes* concurrence is evidenced by the fact that this Court subsequently felt constrained to reiterate Mr.

Justice Stewart's warning in the *Bonelli* case where the Court had found it unnecessary to even decide whether the state's assertion of title to accreted lands constituted a taking of the riparian owner's property therein.

The ruling of the Colorado Supreme Court in *Huston* is in direct conflict with the pronouncements of this Court in *Hughes v. State*. The two cases are factually indistinguishable. In *Hughes*, patents from the federal government included as an incident to the land conveyed, the rights to any accretions thereto. In *Huston*, patents from the federal government included, as an incident to the land conveyed, the rights to the nontributary water beneath the surface. In *Huston*, as in *Hughes*, patents from the federal government included, incident to the land conveyed, rights in and to the contested property. In *Huston*, as in *Hughes*, such property rights of the landowner were derived by patents from the United States Government, were recognized under federal common law and had been unequivocally confirmed by the highest court of the state some twenty years prior to the decision renouncing the same. Unlike *Hughes*, however, the retroactive transformation of private property into public property effected by the decision of the state supreme court in *Huston* stands unredressed, unless this Court accepts this case for its consideration.

B. Patents to land from the federal government conveyed nontributary ground water as part of the land in which such water was found.

The right of a landowner to the water in his soil has long been recognized under federal common law. *See United States v. Alexander*, 148 U.S. 186, 192 (1893). If the United States, the original owner of public domain

lands and of the nontributary ground water contained therein, never affirmatively separated the title to such water from that of the land, title to nontributary ground water would necessarily remain today with the United States or, as to those portions of the public domain which were patented to others, have passed to and reside with patentees of the federal lands.

In *Huston*, the Colorado Supreme Court incorrectly held that the United States "severed" nontributary ground water from the realty at the time it patented lands, and reserved it for the use of the public according to state law. (Opinion at 28). This view is said to be supported by the federal scheme for transfer of public domain lands, implemented through the Acts of 1866 and 1877, "whereby the states were granted broad authority to provide for the use of non-navigable water within their borders." (Opinion at 54).

The grant of authority to the states in the Act of 1866 provides:

> "*Whenever, by priority of possession, rights* to the use of water for mining, agricultural, manufacturing, or other purposes *have vested* and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. . . ."

Ch. 262, § 9, 14 Stat. 253 (currently codified at 30 U.S.C. § 51 (1976) (emphasis added)). By its clear and express wording, this statute is applicable only to those waters of the state of Colorado as to which Colorado's local customs, laws, and decisions of courts make *priority* the criterion of relative right. Thus, as demonstrated in Section C hereafter, the statute deals only with surface or

tributary waters, and not nontributary waters at issue here.

The Desert Land Act of 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. § 321 (1976)), by its express language and as construed, similarly fails to support the contention that nontributary ground water was severed from the realty when the federal government patented lands thereunder. According to the Act, the right to the use of water by a claimant depended upon prior appropriation, limited in quantity to the amount of water actually appropriated and necessarily used for irrigation and reclamation purposes, and "all surplus water . . . together with the water of all lakes, rivers, and other sources of supply *upon* the lands and not navigable" were to "be held free for the appropriation and use of the public." *Id.* (emphasis added). *Accord California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935) (holding that the Act "effected a severance of all waters *upon* the public domain, not theretofore appropriated, from the land itself" and that a patent carried with it "no common law right to the water *flowing through* or *bordering upon* the lands conveyed." (emphasis added)). The Desert Land Act simply did not concern or affect title to nontributary, non-surface water in Colorado.

The title of the United States to the nontributary ground water underlying the public domain was thus undiminished by the Acts of Congress concerning waters in or tributary to natural surface streams, and today remains in the United States or has passed by patent to patentees of federal lands.

C. State law has always recognized that ownership of nontributary ground water is vested in the overlying landowner.

In *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963), the Supreme Court of Colorado unequivocally confirmed what had long been the law governing ownership of nontributary ground water within the state. Therein, the question before the Court was whether a 1948 decree adjudicating the priorities of certain nontributary wells was valid and would support an injunction prohibiting others without decreed rights from withdrawing water from the same aquifer.

The lower court, in granting the injunction, concluded that "[t]he underground waters [were] public and subject to private appropriation by putting to beneficial use, and the decree adjudicating priorities was valid." *Id.* at 160, 385 P.2d at 133. The Colorado Supreme Court reversed. It held that the nontributary ground water belonged to the owner of the overlying land and that, consequently, the court had been without jurisdiction to adjudicate the same in 1948. The Colorado Supreme Court stated that "water not tributary to any public stream . . . is . . . private property", *id.* at 172, 385 P.2d at 139, and cited with approval the following language:

> Ground water, in Colorado's century of water use development, is not to be regarded as property of the public, except in such instances where it is tributary to a natural stream. * * * It has long been recognized that farmers may sink wells on their farms to make reasonable use of the ground water. Public interest requires that a social economy built in reliance on a principle so long recognized should not be disturbed.
>
> * * *

> *The landowner has property in the water in his soil. It is a vested right which cannot be taken away by mere legislation.*

Id. at 173-74, 385 P.2d at 140 (emphasis added).

The law of ownership of nontributary water was established prior to the issuance of patents from the federal government. That law has been evidenced by local customs and recognized in the decisions of Colorado courts not only in *Whitten* but also as recently as 1979 in *Stonewall Estates v. CF&I Steel Corp.*, 197 Colo. 255, 258, 592 P.2d 1318, 1320 (1979).

Thus, *Whitten v. Coit* expressly confirmed what had always been the common law and has remained until *Huston* the law, that ownership of nontributary ground water in the state is vested in the overlying landowner.

D. The Colorado Supreme Court's Opinion in Huston results in an unconstitutional taking of the vested property rights of landowners in the nontributary ground water contained in their soil.

In *Huston*, the Colorado Supreme Court disregarded the property rights in nontributary ground water recognized at federal common law, which were vested long ago in the United States and in patentees of federal lands, and departed from the Court's own unmistakable prior property pronouncements that the overlying landowner owns the nontributary water in his soil. The Court's Opinion indicates that such water is now *publici juris* (owned by the public) and subject to disposition, or allocation for use, according to the desires of the state through the legislature.

The Court's position on the ownership issue is fundamentally flawed in several respects. First, the Court incorrectly determined that the title of the United States to nontributary ground water was severed from the realty and reserved for the use of the public according to state law at the time the federal government patented its lands. Second, the Court mistakenly concluded that it was unconstrained to recognize the property rights confirmed in *Whitten* because (1) the pronouncements in *Whitten* concerning private ownership of nontributary ground water were not necessary to that decision; and because (2) "given the state's plenary control over development of water law, the traditional property concept of fee ownership [was] of limited usefulness as applied to nontributary ground water. . . ." (Opinion at 55).

The above justifications advanced by the Court may well call to mind Justice Stewart's warning in *Hughes* that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. State*, at 535-36. By misinterpreting the clear import of enactments of Congress, the Colorado Supreme Court concluded that property rights to nontributary water were not vested in the federal government or in individuals by virtue of grants from the federal government. Similarly, by characterizing the pronouncements in *Whitten* concerning ownership of nontributary ground water as "unnecessary" and of "limited usefulness," the Court denied that rights of the overlying landowner to the nontributary ground water in his soil were recognized under state law. The pronouncements in *Whit-*

ten were clearly not *obiter dictum*. The determination therein of the invalidity of the 1948 decree adjudicating priorities of nontributary wells depended entirely upon whether the subject water was publicly or privately owned. If the water was public, it was subject to adjudication; if it was private, it was not. Moreover, the Colorado Supreme Court's view as to the relative "usefulness" of various property doctrines simply cannot, as a matter of federal constitutional law, justify its substitution, without compensation, of a more appropriate or expedient method by which rights to utilize nontributary ground water should be recognized, in derogation of the federal and private property rights previously vested therein.

What the Colorado Supreme Court has done in *Huston* is to deprive the United States Government of the power to hold title to or convey, either before or after Colorado statehood, the entire property which the United States has in unpatented land. By erroneously construing the acts of 1866 and 1877, and contrary to the will of Congress as expressed in those acts, the Colorado Supreme Court has seized the nontributary ground water underlying land of the United States and deprived the United States Government of the power to own or to convey that water to a patentee.

Insofar as the Opinion of the Colorado Supreme Court in *Huston* denies private and federal ownership of nontributary ground water and authorizes the state to dispose of it or allocate it for use, the Court has effectuated a taking of the private property which every landowner in Colorado has in any nontributary ground water underlying his land. Such a result cannot stand under the

fifth amendment to the United States Constitution, made applicable to the State through the due process clause of the fourteenth amendment.

II. The Opinion Of The Colorado Supreme Court Interprets Statutes In Such A Way That They Impair The Obligation Of Contracts.

Article I, Section 10 of the Constitution of the United States prohibits the state from passing any law "impairing the obligation of contracts." The Opinion of the Colorado Supreme Court interprets the federal and state statutory scheme in a way which reaches that unconstitutional result.

The United States Supreme Court in *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 429-30 (1934), stated:

> "This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."

In *Hann v. City of Clinton,* 131 F.2d 978, 983 (10th Cir. 1942), the Tenth Circuit Court of Appeals stated the well-recognized rule that:

> "The law existing at the time of the issuance of bonds and authorizing their issuance entered into and becomes an essential part of the contract in such way that the obligation of the contract cannot be impaired or its fulfillment hampered or obstructed by subsequent change in the law."

The Court further noted the prevailing rule that:

> "[T]he settled judicial construction placed upon a statute becomes as much a part of it as the text itself, so far as contract rights acquired under the statute are concerned; and *in point of impairment of the ob-*

> *ligation of the contract, a change of decision after the rights are acquired is to all intents and purposes the same in its effect as an amendment of the law by means of a legislative enactment.* (citations omitted) (emphasis added).

Based on Colorado law, as specifically enunciated in *Whitten v. Coit* in September of 1963, all contracts entered into for the sale and purchase of land incorporated the existing law, as declared by this Court:

> "... Water not tributary to any public stream ... is ... private property."
>
> • • •
>
> "The landowner has property in the water in his soil."

Whitten v. Coit, 153 Colo. at 172, 174, 385 P.2d at ———.

During the twenty years between *Whitten* and *Huston*, there have undoubtedly been thousands upon thousands of contracts entered into for the purchase and sale of land within the State of Colorado. Although in its current posture there has yet been no evidence before the Court of contracts entered into in reliance on that law, such reliance is presumed. As succinctly stated by the court in *Continental Supply Co. v. Abell*, 95 Mont. 148, 171, 24 P.2d 133, 140 (1933):

> "It is unnecessary that it be shown that reliance was actually placed by Defendants upon the former decisions. Reliance thereon will be presumed." (citations omitted).

That same principle was stated by Justice Cardozo in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 362 (1932), when he stated that the

carrier and shipper involved in that case "would be presumed to bargain with each other on the basis of existing law." To now state, as the Colorado Supreme Court's Opinion does, that the purchaser of land does not obtain ownership of the underlying nontributary ground water impairs the very substance upon which purchasers and sellers are presumed to have bargained with each other in contracts for conveyance of Colorado land. In so doing, the Opinion reaches a result not tolerable under the United States Constitution.

CONCLUSION

In *Huston* the Colorado Supreme Court committed exactly the same errors which this Court corrected in *Hughes v. State*. By its decision the *Huston* court denied the validity of federal property rights, whether retained by the United States or patented to private landowners, it effected a taking of property without compensation and it impaired the obligation of contracts for the purchase and sale of land. The Court's startling repudiation of property doctrines clearly established in *Whitten v. Coit* effected an intolerable change in property law with widespread impacts upon both private landowner and the federal government. Review of the case by this court is imperative in order to prevent a conflict between the Colorado Supreme Court's decision and the principles enunciated by this Court in *Hughes v. Washington* and later reaffirmed in the *Bonelli* case.

FOR THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

By GLENN G. SAUNDERS,
MELVIN B. SABEY,
DEBORAH L. FREEMAN,
of SAUNDERS, SNYDER, ROSS
& DICKSON, P.C.

303 East Seventeenth Avenue
Denver, Colorado 80203
(303) 861-8200

Attorneys for Petitioners

83-1310

No._____

Office - Supreme Court, U.S.
FILED
FEB 6 1984
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1983

EDWARD T. YOUNG, JR., WILLOWS WATER DISTRICT, SOUTH CHERRY CREEK LAND COMPANY, SMOKEY HILLS LAND COMPANY, EAST CHERRY VALLEY WATER AND SANITATION DISTRICT, ADOLPH COORS COMPANY,

Petitioners,

vs.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF COLORADO

GLENN G. SAUNDERS
MELVIN B. SABEY
DEBORAH L. FREEMAN
of SAUNDERS, SNYDER, ROSS & DICKSON, P.C.

303 East Seventeenth Avenue
Denver, Colorado 80203
(303) 861-8200

Attorneys for Petitioners

February, 1984

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

Pages

Appendix A—Ruling, Judgment and Certification ..... App. 1

Appendix B.—Appeal from the judgment of the Special Water Judge ..... App. 55

Appendix C—United States Constitution Amendments V, XIV ..... App. 116

APPENDIX A

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF ARAPAHOE
STATE OF COLORADO
Consolidated Cases
Water Divisions Nos. 1, 2, 3, 4, 5, 6 and 7
79 CW 1 (ARAPAHOE)

SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT; NORTHERN COLORADO WATER CONSERVANCY DISTRICT; SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, et al.,

Petitioners,

vs.

JOHN HUSTON; ALAN LEAFFER; WALLACE YAFFE, d/b/a various John Doe and Richard Roe joint ventures; NEDLOG TECHNOLOGICAL GROUP; COLORADO PACIFIC ENERGY; COLORADO PACIFIC AZTEC; and BOB JOHNSTON, JR., et al.,

Respondents.

RULING, JUDGMENT AND CERTIFICATION

(Filed February 11, 1981)

CASE PROCEDURE

PART I

The Supreme Court of the State of Colorado by Order dated April 16, 1979, consolidated certain specific applications for adjudication of water rights filed in all seven water divisions of the state by certain specified claimants. This Court was appointed as a Special Water Judge in all seven divisions to determine answers to questions

submitted by the Supreme Court in its Order of Consolidation. The case in this Court was entitled as above captioned and numbered 79-CW-1 (Arapahoe).

This Court first fixed a final date for entry of appearances, and published notice statewide in all water divisions. Over 102 attorneys entered timely appearances and to facilitate determination of the issues submitted, and for economical reasons, this Court appointed a Trial Committee, composed of attorney personnel from each of the seven water divisions, together with the Assistant Attorney General of the State of Colorado, an attorney for each claimant, and the Assistant United States Attorney.

The Trial Committee was ordered to analyze all pending applications, thereafter to divide the claims into classes, and then select one claim in each class fairly representative of all in that category.

This Court then ruled that it would treat the applications as being presented somewhat in the nature of a motion to dismiss under the Rules of Civil Procedure. It would be assumed that all matters alleged in the representative applications could be proven and the Court would then, as a matter of law, decide whether the claimant would be entitled to the relief requested in the application. The Court's ruling would be under Rule 54(b), CRCP, 1973 CRS.

The determination would be made based upon legal briefs and oral argument. If the Court needed further evidentiary information, the Court would request affidavits and the matter would then be treated as a motion for summary judgment under Rule 56(e), with the same result as a motion to dismiss under Rule 12(b) (5).

Briefs were filed and oral argument held, pursuant to which the Court is making the following rulings as to the questions submitted by the Supreme Court.

Unless otherwise specified, non-tributary water and *de minimis* non-tributary water will be referred to as being synonymous under existing case law and, likewise, under existing case law considered as developed water.

QUESTION NO. 1 (Q.1)

Are non-tributary waters in Colorado subject to appropriation?

This question is answered in the affirmative.

Long established law in Colorado is that all ground water is presumed tributary to a stream and if underground water is claimed to be non-tributary, the burden is on the one claiming the non-tributary status to prove that fact by clear and satisfactory evidence. *Safranek v. Limon,* 123 Colo. 228, P2d 975; *DeHaas v. Benisch,* 116 Colo. 344, 181 P2d 453; *Comrie v. Sweet,* 75 Colo. 199, 225 P2d 214; and other cases.

In the applications before this Court, that burden must somehow be sustained before the question posed becomes an issue for decision.

The Legislature has recognized that non-tributary groundwater can be appropriated. From the date of the first legislative act affecting underground water in designated groundwater basins, such water has been determined as subject to appropriation. *Fundingsland v. Colorado Groundwater Commission,* 171 Colo. 487, 468 P2d 835, and subsequent cases.

Even if water in designated basins may actually in fact be tributary, if its motion to a stream is *de minimis*, it is still considered as non-tributary in nature. *Kuiper v. Lundvall*, 187 Colo. 40, 529 P2d 1328, and cases cited therein.

Therefore, if it is not moving in a *de minimis* manner, it must axiomatically be non-tributary and if in a designated groundwater basin, it is clearly subject to appropriation under 37-90-102, CRS 1973.

Since it is concluded that Colorado has recognized non-tributary underground water in designated basins as appropriable, it is then further concluded that non-tributary water outside a designated groundwater basin must likewise be appropriable.

This Court perceives no valid distinction between non-tributary water in a designated basin and non-tributary water outside a designated basin, except the establishment of agencies to supervise and manage, as provided by law, being superimposed in the designated basin areas.

The character of the *water itself* is identically the same. It is all water and it is all non-tributary.

The determination of the affirmative answer to Question No. 1, that non-tributary water outside a designated groundwater basin is subject to appropriation, is not determinative of the remaining issues. It is here noted that the right to appropriate waters of this state antedated the State Constitution. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443.

QUESTION NO. 2 (Q.2)

By what authority can such waters be appropriated?

Statute in Colorado, namely, 37-90-137, CRS 1973, provides the method for the appropriation of non-tributary water outside a designated groundwater basin. It provides not only the method, but requirements and time elements involved. Further, the statutes provide for appeal of actions of the State Engineer, both before and after the 1979 Amendment to the foregoing section. It is provided that appeal of decisions of the State Engineer shall be made to the District Court of the county where the well involved is located. Prior to court decision, *Jackson v. Colorado,* 294 Fed. Sup. 1065 (Colorado, 1968), and the 1979 Act, the appeal was trial de novo, thus eliminating appeal under Rule 106, CRCP, certiorari review. The 1979 Amendment, 37-90-115, now provides that the review shall be under 24-4-106, CRS 1973, the Administrative Procedures Act.

While this amendment cannot be applied retroactively as to those applications pending in this case where no permit has been requested the State Engineer has not acted and no appeals are pending, it is the finding of this Court that in any future action by the State Engineer under 37-90-137, supra, appeal must be to the county where the well is located and the procedure to be followed would be under 24-4-106, CRS 1973, except as to some Nedlog claims. As to those, this Court rules that by reason of the consolidation of the applications and the time involved in reaching a conclusion in this case, time limitations for appeal are stayed as to the actions of the State Engineer and where such actions occurred prior to this consolida-

tion, anyone desiring to appeal the State Engineer's rulings shall have the time set forth under the Administrative Procedures Act, beginning with final determination of this case, unless time for appeal of the State Engineer's action had fully expired both prior to the 1979 Amendment and prior to the consolidation of these claims for determination by this Court.

Regardless of some proceedings conducted by individual Water Judges in some of the seven divisions, this Court does not interpret 37-92-302(2), CRS 1973, as creating a method for appeal of a decision of the State Engineer. This section only provides for a requirement to be fulfilled before the Water Court can make rulings and orders. Nothing in Article 92, Chapter 37, creates a substitute for the appellate procedure provided for in 37-90-115, supra, and review of the State Engineer's actions under said Section 115 is held to be a prerequisite to any right in the Water Court to proceed under 37-92-302, supra.

Analysis of the various statutes, beginning with the Session Laws of 1957, the Act of 1965, and the Act of 1969, discloses that each and every expression of legislative intention regarding appeal has been continuously the same; namely, that appeal is to the District Court of the county where the proposed well is located (except that under the 1957 Act it was the county where the user was located.)

Appeal has always been trial de novo until the 1979 Amendment adopting the Administrative Procedures Act, which permissively allows the court considering the same on appeal, to take additional evidence to that disclosed by

the record, should the court considering the appeal in its discretion determine to do so.

The mere fact that it is possible that the District Judge in the county of the location of the well might also have been designated as the Water Judge of a division makes no difference. On appeals from actions of the State Engineer, he is nonetheless hearing the matter as a District Judge under 24-4-106, supra, and not as a Water Judge under 37-92, CRS, supra.

This Court does not share the view, nor the fear, of some of the applicants that the State Engineer may become a "water czar." His actions are always subject to review in the proper District Court.

Therefore, the answer to Question No. 2, as posed by the Supreme Court, is in the affirmative, that the authority for appropriation of non-tributary water outside designated groundwater basins is 37-90-137, CRS 1973, and that appeal is under the Administrative Procedures Act, 24-4-106, supra, to the District Court of the county where the proposed well is located in the event of dispute with or desire to appeal a ruling of the State Engineer.

QUESTION NO. 3 (Q.3)

Can non-tributary water outside the boundaries of designated groundwater basins be appropriated by persons having no property interests in the surface?

The answer to this question is a *qualified* affirmative as to appropriation only, with the qualification as hereinafter set forth.

The time has come, as has been inevitably certain, to distinguish between a well and a surface stream diversion by headgate and ditch.

It has been held that "diversion" as a part of an appropriation was a "court made" theory until the Legislative Act of 1969, *Colorado River Water Conservancy District v. Colorado River Conservancy Board, Enwold and Town of Aspen,* 197 Colo. 469, page 473, 594 P2d 570.

The 1969 Legislative Act defined "diversion" and included "well" as a means thereof.

This Court is, however, of the opinion that there is a distinct physical difference between a headgate on a stream with its partners a dam and ditch, as opposed to a well and its partner the pump. While both may be loosely referred to as diverting water and achieve the same results with regard to appropriation and beneficial use, it is this Court's opinion that a "headgate" requires an interceptor dam *impeding a surface flow going in a fixed direction,* changing the direction of that flow into the headgate and ditch.

(That a well pumping water which is *tributary* might possibly be somewhat similar is not necessary to the determination of the questions submitted to this Court in this action.)

As to non-tributary groundwater, the well and pump are *withdrawing* or *extracting,* similar to a mining operation. The definition in *Black's Law Dictionary* of the word "diversion" is that it means turning aside or altering the natural course of a thing, and the word "divert" means to turn aside, to turn out of the way, to alter the *course* of things, usually applied to water courses.

Since non-tributary water is theoretically not moving in any particular direction, the well and pump change only the elevation of the water to apply it to beneficial use. They do not change the direction of flow or turn aside the direction of the *course* of the water.

In effect, they develop or mine, rather than intercept. They perform this function by means of privately-owned personal property in the form of the pump, appurtenant equipment, and casing, all of which is personal property owned outright by the developer of the well.

If the water is *de minimis* non-tributary in nature, it *may* have some direction of flow, but the well and pump are still not turning that direction aside, but are only extracting or withdrawing water from a semi-static state. *De minimis* non-tributary water, if moving, may be doing so in one or several different directions. Still, the water and pump change elevation, not direction of flow, in order to apply the water to a beneficial use.

It is this Court's opinion that the right as set forth in case law to use another's headgate and ditch should not be expanded into a right to use another's personal property and well, located on his realty, without the owner's consent.

To drill and equip and well, one must in almost all cases be engaged in construction upon privately-owned property. The right to condemn a right-of-way, as set forth by the Constitution and statutes, does not apply. The provisions of the State Constitution and staues which authorize condemnation of rights-of-way states as follows:

> Constitution: "All persons shall have a right-of-way *across** private lands for the construction of *ditches,*

canals, and *flumes for conveying* water." (Emphasis added.)

This does not grant a right to take land to drill and construct a well, to develop a well, or to excavate on private real property.

The statute, 37-86-102, provides that any person *"owning"* a water right, or conditional water right, shall be entitled to *a right-of-way* through lands which lie *between the point of diversion and the point of use,* or where the proposed use for the right-of-way is for the purpose of *transporting* water.

Obviously the statute cannot apply until (1) the person claiming a right-of-way has already become the *owner* of a water right or a conditional water right and (2) thereafter the statute applies only to transporting from one point to another across intervening lands.

The Court also concludes that 38-2-101, et seq., supra, does not apply to condemnation of, or for, wells. The statutes, 38-1-101 and 102, apply to reservoirs, drains, flumes, or ditches for agriculture, mining, milling, domestic, or sanitation purposes.

These terms do not include construction work on privately owned real property, drilling of wells, equipping of wells, and particularly not to the condemnation of *personal* property. The Court is aware that some cases hold that municipal corporations, or quasi-municipal corporations, formed for specific purposes, such as an irrigation district, may condemn for a well site, but where private parties are concerned, even a right to survey is restricted under the eminent domain Acts to road, tunnel, *ditch,* or

railroads and to companies formed for those specific purposes.

Hence, if a well, pump, and appurtenant fixtures are necessary to develop water, apply the same to a beneficial use, and thus obtain a conditional or absolute water right, one must have the consent of the landowner, or be the landowner, in order to conduct the necessary construction involved.

The affirmative answer to Question No. 3 is thus qualified as to the right of entry to appropriate. There is no such right unless the proposed appropriator is the landowner, or has the consent of the landowner first obtained, to erect physical works upon the real estate.

This Court is not unmindful of the importance of the maximum use doctrine, as announced in several decisions of the Supreme Court, but private rights of ownership of real and personal property must also be constitutionally protected, and the non-tributary groundwater will not be lost as a result. It will eventually be developed in an orderly fashion consistent with the protection of those private rights.

While water may be appropriable, the means to appropriate as to non-tributary underground water are, at least at present, in the absence of further legislative action, limited to the owner of the land or one utilizing the land with the consent of the owner.

This Court is also aware of the recent decision of the Supreme Court in *Bubb and Yaeger v. Christensen*, — Colo. —, 610 P2d 1343. However, the Honorable Justice Lohr in that opinion expressly excludes any determination of a

right to trespass to initiate a water right and the footnotes clearly indicate that the decision is limited to the specific facts of that case; namely, that the trespass had already occurred, is not a defense to the entry of a *final* decree in a water adjudication proceedings, the landowner had no development of his own, and a condemnation proceeding was in fact already in process. Further, it was determined that the water source was not a well, but was determined as being "unnamed springs."

This Court expressly disagrees with any concept that a claimant may at will commit a trespass to engage in construction on another's property, or that 37-86-102, et seq., gives any right to a private person to condemn another's property for purpose of constructing a well on that land. Again, certain municipal or quasi-municipal agencies may have such rights. *Riverside Irrigation District v. Lamont*, 152 Colo. 151, 572 P2d 151.

QUESTION NO. 4 (Q.4)

Can non-tributary water outside designated groundwater basins be appropriated for use by persons other than the claimant, or those whom the claimant is authorized to represent?

Case law in Colorado establishes that each case involving the above issue should be considered on an ad hoc basis. *Elk Rifle v. Templeton*, 173 Colo. 438, 484 P2d 1211, and other cases.

However, if a claim for water in an application for adjudication is phrased in pure general language for extreme magnitudes of amount, where the proposed appropriator claims no ownership in any land, designates no

place of use, even in the broadest of descriptions (as was the case in *Taussig v. The Moffat Tunnel Company,* 106 Colo. 384, 106 P2d 363), and is thereby attempting to tie up under a conditional priority date, vast quantities of underground water and, thus, antedate those who later might have a real need and uses, and force them to deal with the owner of the conditional [illegible], such claim is not within the principle of the maximum use policy or in line with case law. *Denver v. Northern Colorado Water District,* 130 Colo. 375, 276 P2d 992; *In the Matter of the Application for Water Rights of Mills E. Bunger, et al., v. Uncompagre Valley,* 192 Colo. 159, 557 P2d 389; and *Colorado River Water Conservation District v. Vidler Tunnel Water Company, State of Colorado Department of Natural Resources and Lee Enwold,* 197 Colo. 413, 594 P2d 566. All these cases hold at a minimum that by the application for adjudication may show the purely speculative nature of the claim by the nature of the language of the application itself.

The answer to Question No. 4, therefore, again is a qualified affirmative, the qualification being that an appropriator must have beneficial uses at hand, or actual need, contact with, or agency with, those having such need and existing beneficial uses in mind. The application cannot merely argue maximum use or general need in some unknown area, not even limited to the state boundaries of the State of Colorado.

The applictaion itself, without other evidence, can indicate by the size of the quantity claimed and the uses listed and the general purposes *only* being stated, that it is pure speculation for monetary or pecuniary benefit and

that the decree is sought for profit, rather than actual beneficial use by the applicant.

This Court is accuately aware that a conditional decree can tie up water by priority date for many, many years while diligence matters and hearings proceed. All too frequently a showing of due diligence, as required by statute, is found to be adequate, based on very minute, or minimal, activity. Thus, huge quantities of water could be claimed as of a certain priority date, and with an absolute minimum of investment, be withheld from later appropriators in dire need of development and actual use, unless tribute is paid to the conditional decree holder.

Water in reasonable amounts may be appropriated for beneficial use by owners, or for those who the claimant is authorized to represent, where agreements with owners are in process or actual discussion, or where those in need of the water cannot for some reason provide the finances necessary to construct the works, or temporarily, at least, are unable to do so. Then, as in the *Taussig* case, supra, a conditional decree *might* be justified, but not under conditions as in the *Bunger* case, supra, or the *Vidler* case, supra.

QUESTION NO. 5 (Q.5)

Can applications for non-tributary waters outside the boundaries of designated groundwater basins be filed (a) without first obtaining permits from the State Engineer and, if so, (b) without first applying for such permits?

This Court is puzzled by the language of the question, but must assume that the intent of the question would, or should, include certain omitted words and that the question in fact is:

"Can applications for (adjudication of) non-tributary (underground) water outside the boundaries of designated groundwater basins be filed (a) without first obtaining permits from the State Engineer and, if so, (b) without first applying for such permits?

Since this Court has found no distinction between non-tributary water in a designated basin, and non-tributary water outside a designated basin, with regard to the right to appropriate, and has further found that 37-90-137, supra, applies as to the appropriation of water outside a designated basin and, further, that 37-92-305(6) *requires* that evidence of a request for a permit, either granted or denied, supplement an application for adjudication before any decree, decision, ruling, or order can be entered by the Water Court (37-92-302), this Court reaches the following conclusions:

Although 305(6) of Chapter 37, Article 92, supra, provides that the referee or Water Court should "consider the findings of the State Engineer," it seems clear, as this Court has previously determined, that this does not refer to appellate procedure. It states that the Water Court "may grant" a decree unless the denial of the permit is "justified." Also, as heretofore determined, the question of justification is a matter, if a permit is denied, for an appeal, to be determined under the Administrative Procedures Act by the District Court of the county of the location of the proposed structure. Specifically, Section 305(6), supra, only sets forth *guidelines* or *standards* for the referee and Water Judge. It does *not* establish appellate procedures. Appellate procedures are set forth in Chapter 37, Article 90, supra.

While it is not specifically required by statute that a permit be issued before the filing of an application in an adjudication proceeding, or that application for a permit be made prior to filing an application in an adjudication proceeding, common sense dictates that there is no chance for any ruling, decision, or order by the Water Court under 92-302, supra, unless the permit has either been granted, or appellate procedure from a denial, or arbitrary reduction in quantity, have been completed, with the State Engineer having, as a result, been overruled.

To void obvious confusion, as has been created in this case by a premature filing of applications in adjudication proceedings, it would seem that (since the priorty date goes back to the first step in adjudication proceedings and would not be affected by waiting to file the application, or a filing of the application without a setting for hearing), the legislative intent in construing the two Acts together should be, that an application for adjudication should not be filed until a permit for a well has been issued by the State Engineer, or denied and the appellate procedures resulting therefrom, with a reversal, has been completed. However, if it clearly appears that the priority date for a particular calendar year may be lost, then the application could be filed and no hearing set until the State Engineer has acted and appellate procedures are concluded.

Again, this Court is not unaware of the fact that some Water Judges have permitted this to occur, and have treated the permit problems somewhat in the nature of an appellate procedure, but such past action is not considered as being precedent for continuing error.

The *application* does not constitute the first "step" in establishing a priority date. It is only common sense that

the application await the final determination of the State Engineer's action before being filed or set for hearing.

The foregoing are the original questions submitted by the Supreme Court and the determination thereof. On a later date this Court requested, at the instance of some of the parties, the right to consider certain rephrased supplemental or additional questions, and the Supreme Court, by Supplemental Order, authorized the Special Water Judge to consider those additional questions "in his discretion."

As to such of those questions as are contained in the Supplemental Order which the Special Water Judge intends to address, determination will be made by the appropriate ruling to the representative application in the various classes of claims prepared by the Trial Committee without specifying the question or an answer thereto.

PART II

APPLICANTS BY CLASS

Class 1—Underground reservoirs.

Representative case: W-3971, Water Division 3.

Applicant: Bluepond Associates.

Bluepond Associates, one of the group referred to by the Supreme Court in its decision as the joint venturers, filed application for the adjudication of 72 underground storage rights involving tributary water. The venturers took the position that since this was tributary water, the Special Water Judge was not authorized to consider the same. However, the Supreme Court had specifically listed these applications by number in referring the matter to the Special Water Judge and, with re-

gard to tributary water, stated that if it was found that any claim was *solely* tributary water and *if* the Special Water Judge should find that such transfer would not prejudice any rights, *then* the Special Water Judge *may* transfer the claim back to the Water Judge of the division for hearing and disposition.

Under this latter provision, it is the position of the Special Water Judge that these particular claims for storage rights, although involving only tributary water, would prejudice other water rights and therefore jurisdiction to continue to consider the same was retained.

Each of these applications requests a decree for underground water storage where a naturally occurring glacial terminal moraine creates an underground dam. Each of the locations of the alleged storage capacity behind this glacial terminal moraine lies directly under a surface flowing river or stream.

In briefs and argument, the proponents of these projects specifically advised the Court as to what their evidence would show concerning methods of operation for the proposed storage right. These are shown in the form of drawings labeled as Appendixes A, B, and C, attached to the Reply Brief of the Joint Venturers. Without the argument and exhibits, affidavits might have been necessary. (See copies of exhibits attached to this opinion.)

Explanation in argument and evidence by exhibit was offered to show that at present, beneath the flowing surface stream, these underground reservoirs were full of water and that the applicants proposed to pump through shallow wells, or withdraw by french drains, water presently being held there. The water withdrawn was to be

released to the stream, thereby creating empty storage capacity in the glacial moraine.

Applicants proposed to obtain a storage decree permitting them to refill under such decree from the surface stream, by some type of recharge operation, the capacity of the decree, would be determined by the capacity created through the initial pumping out and release of the water to the stream. In every case the over-lying river or stream is named as the source of water for the storage rights. Also no consideration of effect on, or loss to, existing rights by the original withdrawal and release was indicated.

These drawings of the operations and the argument presented, it seems to the court, raise the authorized supplemental question as to whether one can obtain a decree to store in an underground reservoir created by impounding water behind a naturally occurring glacial terminal moraine, and the modified question of whether *tributary* waters can be appropriated for use by persons other than the claimants, or those whom the claimant is authorized to represent, which was one of the original questions as to non-tributary water.

It requires little study of the claimant's briefs and exhibits to see, that at present the surface river or stream is riding on the existing water in storage, which actually is admittedly also moving to a small degree, or amount, into the surface stream, through the lower part of the terminal moraine. This factual situation is no different, as a practical matter, than the description of the alluvial flow of the Platte River contained in *Kuiper, et al., v. Well Owners Conservation District,* 176 Colo. 119, on page

132, 490 P2d 268, where the Honorable Mr. Justice Groves states:

> "In other words, the flow in the aquifer is both downstream and toward the stream. As mentioned in Fellhauer, the surface flow to the river rides piggyback on the subsurface flow. It follows that any withdrawal of groundwater will have some effect on the stream." (Quoting from Fellhauer.)

Here it is perfectly obvious that the initial withdrawal of water to create capacity in the reported underground reservoir, and subsequent recharge from the stream itself, will have an affect on the stream flow, and, of necessity, an affect upon existing decreed appropriations.

It is inconceivable, and beyond the realm of practicality, that the applicants would ever be able to control depletion of the surface stream by infiltration of water, into a vacant capacity immediately under the stream bed for recharge, at only the times the State Engineer should determine that storage decrees be exercised.

Although the applicants argue vociferously that they would fill in accordance with the appropriation date, thereby avoiding injury to others, by release from the reservoir to satisfy earlier claims, it is almost axiomatic that as release takes place additional refill will automatically occur and will come from the surface stream.

It is further inconceivable to the Court, that the applicants could intend, or that it would be financially feasible, to seal by concrete, or some other method, the entire bed of the stream from the location of the dam to the headwaters of the stream, with the proper types of openings in the bottom to control the time when refill from

the stream would take place. Since the points in the surface flow from which the present water comes to keep the glacial moraine full at this time, cannot be determined, there simply is not any method, in this Court's point of view, that filling in accordance with the priority date of a storage right could be controlled. Nor is there any way in which water could be brought from another source, and be placed in the stream without creating some adverse affect on other appropriators and depletion of the surface stream above.

The application makes no reference to filling the demands of downstream senior appropriators through waters from any other source than the river which rides on the aquifer. But even if such should be anticipated, it could not eliminate the adverse affect on those direct flow decrees upstream from the proposed area of storage.

This ruling is not to be interpreted as stating that water cannot be stored behind a naturally occurring glacial terminal moraine at some off-stream site and where recharge might have occurred through normal precipitation on the land and the water is, in effect, at present nontributary and the intent is to withdraw therefrom and refill with decreed water, either storage or direct flow, from some other source. That type of issue is not before the Court.

The application also recites proposed beneficial uses in the broadest of general ways without the location of such use. For example, for domestic, commercial, and irrigation purposes, municipal purposes, or industrial purposes. The quantities of water claimed are vast in magnitude and, from the face of the applications themselves and exhibits submitted to the Court, the claims appear to be

purely speculative, made for purposes of profit and not for purposes of true and actual beneficial use. The Court agrees with the position of some of the objectors that this is a very thinly veiled attempt to obtain a direct flow right under the guise, or disguise, of a storage right.

As a consequence, the Court is of the opinion that treating the application, coupled with the argument and exhibits submitted in the nature of a motion to dismiss or summary judgment can and does result in the Court finding that these claims are without merit and should be dismissed.

It, therefore, is the Order of the Court that all claims of Bluepond Associates in Water Divisions 1, 2, 3, 4, 5, 6, and 7 seeking underground storage rights beneath the channels of flowing streams, being the cases as follows:

Division 1, W-9525 through W-9533, inclusive.

Division 2, W-4829 through W-4832, inclusive.

Division 3, W-3971.

Division 4, W-3556 through W-3571, inclusive, and W-2582.

Division 5, W-3962 through W-3981, inclusive.

Division 6, W-1511 through W-1526, inclusive.

Division 7, W-1899 through W-1904, inclusive.

be and they are hereby dismissed. The Court finds no just reason for delay and this dismissal shall be considered final pursuant to Rule 54(b), CRCP, Volume 7-A, CRS 1973.

Class 2—Well Field Projects.
Representative case: W-4820, Water Division 2.
Applicant: Elk Creek Ventures.

This class consists of applications for underground water rights by Elk Creek Ventures, described as the Las Animas-Cheyenne-Arkansas Project, for the construction of wells, as described in the application, to be physically "interconnected" into an integrated system and is for the withdrawal of allegedly non-tributary water.

The questions applicable to this group of applications are all five of the original questions propounded by the Supreme Court and perhaps certain of the supplemental questions. By virtue of the determination of the answers to the original questions submitted, this Court sees no necessity of addressing the supplemental questions in connection with these claims.

The applications describe physical field surveys, which do nothing more than pinpoint the location of the proposed well, with no mention of ownership of the real property upon which the same is located; contain a general allegation of non-tributary character of the groundwater involved; recite "immediate application to beneficial use, and/or for storage and subsequent application to beneficial use, as well as reuse, successive use, disposition, substitution, and exchange within the particular river basin involved."

The application also has attached, as do the other joint venture claims, a paper recital of intent to appropriate and specifically reciting that well construction permits, or evidence of denial thereof by the State Engineer, or evidence of his failure to grant or deny, are to be submitted to the Water Court prior to the entry of any decision, ruling, or order granting a water right. This presumably refers to 37-92-302(2), CRS 1973.

This Court in ruling on the general questions has indicated that in the interests of orderly procedure, the application for well permits should be made to the State Engineer prior to application for adjudication and any appeal from his action thereon should be taken to the District Court of the county where the proposed well is to be located, under the provisions of 37-90-115, CRS 1973, as amended, and a determination made in such appeal before any adjudication process. This Court reiterates its ruling that the intention of the legislative acts and of the Legislature, by the recital of *standards* in 37-92-205, CRS 1973, "The Water Right Determination and Administration Act" is in no way an intent to create an appellate procedure by the mere words "may grant a conditional decree unless a denial of such permit was justified."

This Court again interprets the meaning of those words as being that the justification must either be found to exist or reversed by the proper court; namely, the District Court of the county where the well is to be located.

Also, in the absence of ownership of the land where the well is to be located, the consent of the owner to construct a well thereon, is a prerequisite, the eminent domain statutes and the Constitution give no right of condemnation of well sites to private parties. All this is explained in the answers to the original questions submitted, principally Question No. 3.

These applications are considered by the Court to be speculative under the *Bunger* case, supra, the *Vidler* case, supra, and other cases, and are clearly for the purpose of profit, rather than application to beneficial use by the applicant.

Consequently, as a matter of law, assuming all of the allegations of the application could be proven, the applicant would still not be entitled to a water right.

These cases, specifically in Division 1, case No. W-9518, W-9519, W-9520, W-9523, W-9524, W-9505, and W-9506, in Division 2 cases Nos. W-4810 through W-4828, inclusive, are hereby Ordered dismissed in this instance however, without prejudice, with the right to renew following completion of applications for well permits or appellate procedures thereon, and the obtaining of the necessary landowner consent, or ownership of the land involved for the well site. The Court finds no just reason for delay and this dismissal shall be considered final pursuant to Rule 54(b), CRCP, Volume 7-A, CRS 1973.

Class 3—Ground Water Infiltration Projects

Water Division 1.

Applicant: Central Metropolitan Water Users.

These applications, total nine in number, all in Water Division 1, and were filed by Central Metropolitan Water Users, another of the same joint ventures, claiming both tributary and/or non-tributary groundwater. The groundwater alleged in the application is a product of infiltration into sewage lines, collectors, and other buried pipes, lines and conduits presently used for wastewater and sewage.

With regard to the claim of such water as may be tributary, the cases are legion ever since *Comstock v. Ramsay*, 55 Colo. 244, 133 P 1107, (and no other citation of authority is necessary), to the effect that underground water percolating, seeping, or traveling to the river, is

tributary thereto, and constitutes a part of the river, subject to the claims of the appropriators thereon. Any direct flow decrees which might be awarded for such tributary water would, of necessity, have to be junior and inferior to all existing priorities as of the date of entry of the new decree.

As to the non-tributary water and the *de minimis* tributary groundwater to which claim is also made, the application clearly states concerning both, that the water would never flow naturally to the stream, or it would never reach the stream naturally in less than 100 years, *if it were not for the fact of its infiltration and transportation by the pipes and so forth hereinbefore described.*

If in fact such pipes are at a depth sufficiently far underground to intercept non-tributary or *de minimis* tributary water, which again is somewhat inconceivable to this Court, or is non-tributary, or trans-basin water returning through sewers to the stream, then, pursuant to existing case authority, such water would be developed water, constituting new water into the basin or stream. It would be created by those who installed the pipes, lines, or conduits, and under case authority, one who does not contribute to the cost of, or contribute in some way to, such development has no right to claim the water developed thereby. It has been unequivocally held that the party responsible for the development of water has the first right thereto, and recapture and reuse thereof. *Denver v. Shulton*, 179 Colo. 47, 506 P2d 144 and prior cases.

It is true, as first discussed in *Brighton Ditch Company v. Englewood*, 124 Colo. 366, at page 377, that appropriators downstream may not force a developer of

new water into the stream, (in that case trans-basin water), to continue to provide such water either from development of non-tributary water, *de minimis* tributary water, or transmountain diversion of water from one basin to another, and that the appropriators on the stream to which this new water is added, have no vested right to a continuation of such new water. Nevertheless, as long as the developer actually does continue to develop and provide such water and fails himself to recapture it for his use, as he is permitted to do (Denver v. Fulton Ditch Company, supra) then the water has left his possession and control, is abandoned and is traveling to the surface stream, it has thus become a part thereof as to all others than the developer, and is subject to use by the existing appropriators on the stream and it may not be claimed by some far junior new-comer free of river call.

Since this is the basis of these claims by Central Metropolitan Water Users (namely, Division 1, cases W-9508 through W-9516), to be free of river call, it is conclusive on the face of the application alone, if everything stated therein is proven and the applicant sustains his burden of proof, still, as a matter of law, the applicant is not entitled to the type of decree sought, for total consumption of water developed by others by use, reuse, successive use, and disposal thereof, or for exchange or substitution.

The foregoing applications are, therefore, Ordered dismissed. The Court finds no just reason for delay and this dismissal shall be considered final pursuant to Rule 54(b), Volume 7-A, CRS 1973.

Class 4—Denver Basin Projects.

Water Division 1

Applicant: Central Metropolitan Water Users.

The applicant here is also the Central Metropolitan Water Users and there are nine applications, all in Water Division 1 involved.

The application requests adjudication of non-tributary water from "unconsumed withdrawals, return flows, and/or wastewater from certain described *existing* wells presently withdrawing non-tributary groundwater, plus certain described wells to be constructed by applicants to divert and recapture such unconsumed withdrawals, return flow, and/or wastewater which allegedly enter non-tributary formations within the Denver Basin."

The Reply Brief of the applicant-joint ventures contains argument and an Appendix F, the latter of which illustrates the proposal. Apparently the proposal is to capture alleged unconsumed withdrawals, return flow, and wastewater from existing wells, and new wells to be constructed, into an "integrated" system on the theory that after application to beneficial use on the surface the unconsumed water or return flow and waste water travels back down to the non-tributary original location from which it was originally withdrawn by either the existing wells or wells to be constructed. The maze of pipelines, and number of real property rights-of-way involving eminent domain proceedings required is beyond imagination.

When this theory was argued, it was pointed out that if water withdrawn was non-tributary, there must be some

sort of an impermeable layer of material between the surface and the non-tributary water. To this argument (and the same situation in Class 5 hereinafter discussed), the joint ventures responded that there was in fact such an impermeable material, as shown on Appendix F, Reply Brief of Joint Ventures (attached hereto), but that the return water perched on top of this impermeable layer, from whence it would be taken by the recovery wells.

Assuming that the applicant's proof would apply solely to wells *constructed by the applicant* and such wells are producing non-tributary water or *de minimis* tributary water, then such water would be developed water, with the applicant as the developer. It would constitute new water into the stream basin, and if the developer could do so, under Denver v. Fulton, supra, they perhaps would be entitled to recapture and reuse to extinction.

On the other hand, if this is non-tributary or *de minimis* non-tributary groundwater developed by *existing* wells and the developers thereof have not sought to recapture and reuse return flow or waste from their development, then while the appropriators on the stream may not insist that they continued to pump and provide such water, such appropriators have, while it is being provided, the first right to the same in the stream and it may not be intercepted by some later junior appropriator, such as Applicant, free from the call of the river. It is tributary at that point in time, subject only to discontinuance by the developer or use or reuse by the developer alone.

As a matter of law, the applicants are not entitled to any unconsumed withdrawal, return flow, or waste water from existing wells constructed by others bringing new

water into the basin. In addition, as a matter of law, the applicants, as private parties, as previously pointed out in this opinion, lack any capacity under existing statutes to enter upon the lands of the well owners for either the purpose of constructing new wells or attempting to intercept waste or return flows from the existing wells.

In point of fact, if the water perching on the impermeable layer includes both water developed by the applicants, and water from other developers, there would seem to be no way in which one type of water could be distinguished from the other, and no way in which the quantity of unconsumed withdrawal, return flow, and waste water from the *applicants'* developed water could be determined, as opposed to such water developed by others, and, as a consequence, a decree with any meaning could not be entered.

In addition, as to both this Class 4 and subsequent Class 5, with reference to *existing* wells, there has been no physical demonstration on the land of the owners of existing wells to give notice to others of intent to appropriate, as required by *Central Colorado Water Conservancy District v. City and County of Denver,* 189 Colo. 272, at page 275, 539 P2d 1270. To integrate some 2,333 wells into one system and to claim 246,160 acre feet a year surpasses the absurd.

As to the claim for unconsumed withdrawals, return flows and/or waste water *from water* actually *developed by the applicant* from non-tributary or *de minimis* non-tributary sources, the application may proceed, with the onus being on the Water Judge to determine the quantity which can be validly reclaimed and reused from water de-

veloped by only the applicant. All claims based on existing wells are dismissed.

In addition, the Court would point out that under these applications there is an attempted claim by the applicant to a right to return flow from sewage disposal plants and power plants, as well as from existing constructed wells, and as to this claim it is clear to the Court that such water is enroute to the surface stream, is tributary thereto, and is considered a part thereof. These claims are dismissed.

The Court finds no just reason for delay and this dismissal shall be considered final pursuant to Rule 54(b), CRCP, Volume 7-A, CRS 1973.

Class 5—Denver Basin Recharge Project.

Case W-9537-78, Water Division 1.

Applicant: Central Metropolitan Water Users.

The applicant is again Central Metropolitan Water users and the claim is for unconsumed withdrawals, return flow, and/or waste water from existing wells, together with wells to be constructed by the applicant, to withdraw, divert, or recapture the foregoing water.

The Court here incorporates all of its comments concerning Class 4, relative to existing wells and rights to developed water.

In addition, however, the Court refers to Appendix E, attached to Joint Ventures' Reply Brief and hereto attached, where once again the perched aquifer above the impermeable shale, which enclosed the non-tributary aquifer, is shown. In this diagram, however, there is one distinguishing feature from Appendix F, Denver Basin Re-

charge Plan, namely Appendix E shows the bed of the river to be adjacent to, and in elevation above, the area where this returning water will supposedly perch.

Assuming, *arguendo,* that the area exists, and from the impermeable shale to the surface, the ground is not impermeable, then, it would appear to this Court that seepage from the river would long since have filled the area where the applicants claim there is space for return flow from the surface to perch. The drawing Appendix E clearly demonstrates this fact.

The Court reiterates, that these applicants have no rights whatever to the existing wells, or return flow therefrom, no rights of eminent domain with regard thereto, particularly as to the personal property involved in the existing rights, and no right to use said existing wells in conjunction, or in partnership, with the present owners, as in the case of a headgate and ditch, which in effect applicants are attempting, by calling such existing wells an alternate point of diversion for the applicant, (paragraph 3(c) of the application), and in addition referring to the whole as an "integrated" system.

The proposed beneficial use is obviously a recitation of general purposes without any actual beneficial use known to exist or intended. No power of eminent domain for a "right-of-way" exists to the presently existing wells, since the applicant is not an "owner" of a water right seeking to transport it from one point to another across the land of another party, as is stated in answers to the general questions. In addition, in this application, the only field work to which a priority date could be attached appears to be merely a survey of the location of an existing

well from the State Engineer's Records or a survey of one point in which a well is to be drilled, one of which points is located in the middle of a publically dedicated street right-of-way. The entire plan and program of the applications appear once again to be clearly for profit, rather than actual beneficial use, by the applicant, either itself, or by contract, or need of others, *Bunger, supra,* and *Vidler,* supra.

It is repeated that as to existing wells there has been no open demonstration on the land where the wells are located to give any notice of intent to appropriate. *Central Colorado v. Denver,* supra.

In the Court's opinion, these applications (being cases W-9494, W-9495, W-9497, W-9498 through W-9503, inclusive) should be, and are hereby dismissed. The Court finds no just reason for delay and this dismissal shall be conidered final pursuant to Rule 54(b), CRCP, Volume 7-A, CRS 1973.

In Classes 4 and 5 the claims are so preposterous that evidence is not necessary to support dismissal.

Class 6.

Representative case: W-4805, Water Division 2.

Applicant: Bob Johnston.

This is one application in Water Division 2, case No. W-4805, requesting adjudication for 53 wells, to be integrated together as one system, claiming "All of the water lying below Applicant's land contained in the Dakota, Cheyenne, and Morrison aquifers." The application contains a general allegation that the applicant intends to construct additional wells as alternate points of diversion, *as may*

be required to recover full productive yields from the three aquifers.

The application further alleged beneficial uses by "immediate application" for domestic, industrial, commercial, irrigation, fire protection, stock watering, recreational, fish and wildlife, and any other beneficial purpose. In addition, it mentions storage and subsequent application of said uses, for exchange purposes, for replacement of depletion, and other augmentation purposes.

As a generality, it is described as a "unified municipal water supply system." This could *not* be immediate.

All of the previous findings and rulings of this Court with regard to right to apply for adjudication, and applications for permits to the State Engineer apply to this case, except that the applicant alleged ownership of all of the land, which for purposes of a motion to dismiss the Court must assume can be proven.

The quantity claimed is again of a huge magnitude, namely, 71 CFS, allegedly yielding a total of 51,430 acre feet per year. It is completely obvious from the argument of counsel for the applicant, and the briefs submitted in his behalf, that none of the proposed beneficial uses, with the possible exception of irrigation, or stock watering, on his own land, presently exist. Or that there is even any demand in any location for the other uses, particularly for a "municipal" system.

Under these circumstances, the Court cannot assume that the applicant will be able to prove *immediate* application, as alleged, to beneficial use of the quantity claimed, even assuming all wells should be immediately drilled,

rather than construction being delayed over a long extended period of years.

It would appear that this is an attempt again to become the owner of a conditional decree to a vast quantity of water, allegedly non-tributary in nature, over an extended period of years, thus totally excluding subsequent developers who might become owners of portions of the land, or might desire to utilize water from the land, having the consent of the then owner thereof to do so, from appropriating water which is lying dormant beneath the surface. The conditional decree could be kept alive with a very minimal amount of diligence, for an interminable number of years.

It was most interesting to the Court that in argument, and brief, counsel for Mr. Johnston stated that by virtue of certain filings made in December, 1979, which never came to fruition, by Mr. Huston, one of the joint venturers in this proceeding, because of such former applications, his actions in this application are not only taken in an attempt to protect, preserve, and develop for use the non-tributary water under his land, but "also to protect himself against the claims of Huston." Self protection is not proper intent to appropriate and apply to beneficial use, to the contrary, it is hoarding water.

This being the case, the Applicant admits in effect that he does not at this time, while intending to try to appropriate, know of any beneficial use needs presently existing for this water, other than as previously stated, perhaps irrigation and stock watering on his own land.

Even the doctrine of maximum use could not possibly justify a conditional decree solely for the purpose of pro-

tecting water resources against the claims of others, nor justify such a clearly speculative profit-making venture.

This Court has previously ruled that well applications should first be made, then applications for adjudication filed to protect a priority date within the year of filing, but should never be set for hearing pending final action of the State Engineer, and of the proper appellate court with regard to the well permit requests.

While this Court does not subscribe entirely to the outright ownership "in fee" of the surface owners in the non-tributary groundwaters underlying his property, as argued by the opponent and concurred in by Johnston, relying upon *Whitten v. Coit* 153 Colo. 157, 385 P2d 131, this Court has indicated that the construction of wells requires ownership of the land where construction is to take place, or consent of the owner of that land. The Special Water Judge has the highest admiration and respect for Mr. William R. Kelly from many years of acquaintance and association, and while the *Whitten v. Coit* case, supra, adopts with approval his language, that language states that the landowner has "property" in the water in his soil which is a vested right, but goes on to state that it is subject to the Reasonable Use Doctrine and Mr. Kelly does *not* state that it is "fee ownership." Hence, this Court departs in its ruling from adoption of the principle that there is such a "fee" ownership in non-tributary water underlying an owner's property.

By virtue of the need of the ownership, or consent of the owner to develop non-tributary water, it is obvious that the ruling of this Court *does* find that the landowner has the first right of development as to non-tributary

waters underlying his property, and the same may be developed by others only with his consent. That consent must include the right to construct the necessary structures, as well as the right to use the water therefrom.

As to this application, it is the opinion of the Court that the claims of beneficial use in excess of that necessary for irrigation or stock watering, on the applicant's land could not be brought into existence for years, and years, and years, and the application as to such fanticized uses should be and therefore, is dismissed, it being provided that the application should by the Supreme Court be referred back to the Water Court in Water Division 2, assuming well permit requests have been made by the time it is remanded, for adjudication and determination by the Water Judge, as to the quantity of water that can be sustained as necessary for beneficial use on the lands of the applicant for irrigation and stock watering purposes.

The dismissal of the balance of the application is based upon its purely speculative nature, its obvious intention to be for profit rather than beneficial use, and the admission that the application was so framed, and filed, purely to try to protect the underground water from the claim of others.

The Court finds no just reason for delay and the dismissal as to the major portion of the claim shall be considered final, pursuant to Rule 54(b), CRCP, Volume 7-A, CRS 1973.

Class 7.

Representative case No. W-1905, Water Division 7.

Applicant: Colorado-Pacific Aztec.

The applicant here has filed two applications, W-1905 and W-1906, in Water Division 7 and W-1905 has been selected as representative of the class. The applicant is described as "Colorado-Pacific-Aztec," without an indication of whether this is a tradename, a corporation, or what type of entity it actually is. It seems, however, that it is neither a municipality nor an organization quasi-municipal in nature.

The application seeks adjudication of 56 wells, but in a most unusual approach. It first seeks 56 wells 300 feet in depth, involving tributary water, but then *in the same identical location* of the first 56, seeks a second 56 wells of a depth of 1,300 feet, claiming to tap non-tributary water by virtue of the depth.

The application further states, and the Court must assume it can be proven, that the consent of all surface owners where well sites are to be located has been obtained.

The total amount of water claimed is stated in gallons per minute, it involves 1,485 gallons per minute of tributary water and 9,837 gallons per minute of non-tributary water. These claims, once again, are for a vast quantity of water, and no explanation is made as to how you draw from the same well in measurable quantities both tributary and non-tributary water at different depths. It would seem obvious, that drawing water from both sources through the same well opening would make any determina-

tion of whether the water produced was tributary, or non-tributary, infeasible, and perhaps impossible.

The proposed beneficial uses are again very indefinite in nature, but do in general, state the location of the use as being "within Water Division No. 7." This general location conceivably *might* be adequate under the *Taussig* case, supra, if the claim being made were not for such an enormous quantity. The applicant does not state that the applicant itself, whatever it is, will apply the water to the proposed beneficial uses and the Court finds the following inconsistencies in the named proposed uses (paragraph 8 of the Application.)

The proposed uses include "agriculture," and yet in paragraph 10, where the number of acres proposed to be irrigated is to be set forth, the applicant states that this is "undetermined." This is speculation.

Further, a beneficial use is claimed for "dust control." In reading all of the cases back to *Coffin v. Left Hand Ditch*, supra, the Court has found no instance where such a use has been found to be a beneficial use.

Next, there is a claim of beneficial use for "land reclamation," which has not heretofore received approval as proper beneficial use. "Cooling," of course, would normally be a 100 percent consumptive use, which the applicant might have the right to achieve as to non-tributary water, the same being developed water, but under applicable law would have no such right as to tributary water without depletion of the stream, to the injury of other appropriators.

Finally, the proposed uses include "slurry pipelines." The Court is aware of the present and past statutes of

Colorado, first holding that no water may be appropriated for use outside the boundaries of the State of Colorado, later amended to include use outside, with those Compact states willing to give Compact credit for water delivered through slurry pipelines. This Court holds, however, that in view of the amended statutes, the Water Court is without jurisdiction to enter conditional or other decrees concerning water for such use, until all preliminary action regarding the Compact, and the compact state involved, have been completed. If the applicant does not intend to proceed under the 1979 amendment, 37-81-101, CRS 1973, as Amended, then use outside of the state under the preceding Acts, 37-81-101 (formerly 148-1-1, CRS 1963), for slurry pipelines to carry solids beyond the state line is totally prohibited. No claim is made by Colorado-Pacific, other than the general claim of use within Water Division No. 7, that there is need existant at this time within that District for use of water for slurry pipeline purposes.

In the opinion of this Court, the application should be remanded back by the Supreme Court to the Water Judge in Water Division 7, for proper adjudication as to claims for tributary water, again assuming that by time of remand applications have been made to the State Engineer for well permits, which appears to have been already done by the allegations of the claim, and subject to the restrictions found by this Court to exist regarding action of the State Engineer and appellate review thereof.

This Court does find, however, that "dust control" may not be considered a beneficial use, and leaves to the determination of the Water Judge the question of whether cooling, and slurry pipelines may constitute beneficial uses. This Court points out that utility companies and munici-

palities have applied water for cooling purposes and it may very well be that this is a proper beneficial use. By no stretch of the imagination is there such a beneficial use as "land reclamation."

As to the non-tributary water, the same may be appropriated as heretofore set forth in this ruling as to other claims, but in remand to the Water Judge the same should occur only under the caveat, that proof must be made that such water can be distinguished from the tributary water, for measurement purposes, and that Colorado-Pacific-Aztec must prove to the satisfaction of the Water Judge that beneficial use is actually going to take place, and further that this application is not solely for profit-making purposes, rather than under a true intention to apply it to beneficial use. Further under an additional caveat that reduction in quantity claimed, may, as a result of evidence presented, indicate that the amounts should be severely cut back.

Class—Nedlog

Representative case: W-4004, Water Division 5

Applicant: Nedlog Technology Group

The representative application selected is case No. W-4004, as amended, in Water Division No. 5. The applicant is Nedlog Technology Group, without specification of whether this is a tradename, corporation, or other type of entity, but again it is apparently not municipal or quasi-municipal in nature.

Just prior to briefing and the argument before the Special Water Judge, the applicant withdrew its claims to "all" of the water in the Burns Basin, allegedly con-

stituting some twenty million acre feet, and withdrew any claim for an underground storage refill right to store and withdraw 20,000 acre feet annually of "refill" water into the Burns Basin.

The applicant maintains its application as to the seeking of a decree for withdrawal through wells of 200,000 acre feet annually from the Burns Basin, plus 20,000 acre feet annually of what the applicant refers to as "lost water" from said basin.

The applicant alleged that the subject water is part of a natural stream, but that stream is not tributary to, or hydraulically connected with any surface stream, alluvial aquifer, or other water, so as to influence the rate, or direction of movement of any such surface stream or alluvial aquifer. This presupposes that the entire Burns Basin extending over several counties, is an impervious bowl with a lower lip, over which water spills at the rate of 20,000 acre feet annually. Assuming this foregoing can all be proven, which is doubtful, it is very clear that there must, a fortiori, be an annual refill to the basin of 20,000 acre feet per year. This recharge must come from some surface source. The applicant claims that the water produced through its wells will be "developed" water and, therefore, new water into the surface streams. Applicant therefore claims the right to reuse, and successive use, or other disposition, free from any limitation, restriction, or requirement as to place of use, amount of discharge, or location or discharge following initial use, reuse, or successive use. Presumably it is intended to claim a right of use to extinction.

The area for the proposed use is "all lands *susceptible* of being served directly or by exchange," (emphasis

added) without any limitation as to location whatever. Further, a claim is made to apply to beneficial use beyond the boundaries of the State of Colorado. As to the latter, this Court has previously pointed out, such use is either totally prohibited or, if the applicant intends to proceed under the 1979 amendment, is subject to use in Compact states which are willing to give credit to Colorado under its Compact commitments for water delivered into that state.

In the event the Water Judge in Water Divisions 5 and 6 were to have jurisdiction of this matter, it is the finding of this Court, as stated heretofore, that all action necessary under the 1979 amendment would have to be completed before the Water Court would have jurisdiction to proceed. If the applicant's intention is not to proceed under the 1979 amendment, then this portion of the claim for use outside the state is prohibited and should be dismissed.

Interestingly enough, the application itself is so general in nature as to *assume* that the applicant would have the authority, or obtain the right to use the Adams Tunnel, a Federal facility, the Moffat Tunnel, and delivery systems belonging to others, but does not claim as in *Taussig*, supra, having negotiated for use of these systems.

Further, the applicant is relying upon certain prior obtained agreements from landowners, examples of which were submitted to the Special Water Judge, in which the contract or agreement specifically and unequivocally states that the landowner and the applicant Nedlog are to share in the *pecuniary profits*.

The proposed uses contain reference to uses which have never been determined as beneficial in nature, such as stream flow enhancement, and the entire application is so general in nature that it cannot be defined otherwise, than as pure speculation.

The applicant also complained in argument, of prior arbitrary actions of the State Engineer concerning well permits applied for, and requests the Water Judge to "require" the State Engineer to issue and review well permits for the applicant. As to any wells presently in existence or those subsequently drilled, this Court has ruled that where the State Engineer has denied in whole, or in part, any permit, appellate review must be to the District Court in the county of location, rather than to the Water Court, and following completion of such appeal the Water Court then may be in a position, as a result, to make a finding that the denial of a permit was justified under 37-90-137, CRS 1973, but not make such determination in an appellate capacity.

The applicant further admits, in the application itself, that the project and expenses associated therewith is of such a "magnitude" (pages 14 and 15, Application) that it would be phased over several years. As has been previously ruled by this Court, no prospective appropriator should be permitted by the obtaining of a conditional decree, to require later appropriators to pay tribute to fulfill their needs, assuming they are able to make appropriations by well in accordance with the determinations set forth in this opinion.

This application is very similar to those in the *Bunger* case, supra, and the *Vidler* case, supra. It is so broad and

general in nature as to be totally infeasible as an entire project.

It is the ruling of this Court that this application should be and is dismissed, in this instance, however, without prejudice to the applicant to file a new application in the Water Court, complying with the terms of this opinion for a realistic quantity of water based upon proper and adequate proof of application of said water to beneficial use within a reasonable time, rather than profit, and stating the nature of the beneficial use and the locations where such use is to occur.

PART III

CONCLUSIONARY MATTERS

A. As stated earlier in this ruling, at the instance of some of the parties, the Special Water Judge requested from the Supreme Court the right in his discretion, to consider certain rephrased supplemental, or additional and subordinate questions. By Supplemental Order, dated August 29, 1979, the Supreme Court granted the request and added seven supplemental questions.

Some of these have been in effect answered in the rulings on the first five questions and the claims involved. The others, the Special Water Judge in his discretion does not consider essential to the rulings herein made and some, such as Supplemental Question No. 5, involve a claim or portion of a claim which has been withdrawn. In the light of the ruling of the Court concerning the fact that non-tributary groundwater outside the boundaries of a designated basin is subject to appropriation and setting forth authority therefor, there is no necessity to take up

the constitutional question of whether or not the waters are appropriable under the Constitution. Nor did the Supreme Court initially, even though requested by some of the parties, refer to the Constitution in its question to the Special Water Judge. The question was deliberately framed to exclude reference to the Constitution.

This Court does, however, declare that, in the opinion of the Court, regardless of the *semantical* language used in the applicable sections of the Constitution of the State of Colorado, where it speaks of "natural streams," such language must be interpreted in the light of the technical knowledge available at the time of the drafting and adoption of the Constitution. It is the opinion of this Court, that although the drafters were limited in knowledge at that time, to perhaps surface flows, and shallow well information, they, nevertheless, intended *subjectively* to state that "all" of the waters in the State of Colorado, wherever located, are to be protected by the Constitution, are the property of the public, and dedicated to the use of the people of the state, subject to legislative enactment prescribing methods of effecting appropriation, and providing, as they later did, for conditional decrees, as well as absolute decrees following application to beneficial use.

B. The United States of America is a party to this proceeding, having been made so by notice served in accordance with the provisions of the McCarran Act, and by making a general appearance, but it appears here in the role of an "objector" to the claims before the Court. In making such objection, counsel for the United States reiterated the old theory of reservation of waters, stating in arguments that all water underlying Federal lands is the property of the United States.

This claim the Court specifically *rejects*. Since the Desert Land Act, and subsequent enactment of Federal legislation, in order to acquire water rights, the United States of America must comply with state law and procedures. The large areas held by the United States and denominated as National Forests and National Parks do not in any way constitute reservations, as that term is used in connection with power plant sites or Indian reservations, where the United States has been somewhat successful in asserting reservation of waters.

By simple pronouncement and argument, the United States of America may not be permitted to substitute a rhetorical "reservation" of waters for a conditional decree, as that is defined and legally entered pursuant to the laws of the State of Colorado. The United States may not withhold from the dedication to the people of this state all this essential natural resource under National Forests and Parks by mere language. It has no right unless or until, it procures a conditional decree and/or final decree in the courts of this state, for whatever beneficial use it intends to make of those subsurface waters and for a fixed quantity thereof.

This is, of course, not a specific issue before this Court submitted by the Supreme Court of this state, nor is it necessarily asserted as an issue, except in the form of an objection, principally to the Nedlog claims of right to withdraw from under Federal lands by wells adjacent thereto. However, this Court feels obligated to point out, that any argument of reservation of waters over such an enormous expanse as the National Forests and National Parks in the State of Colorado is being argued only as a

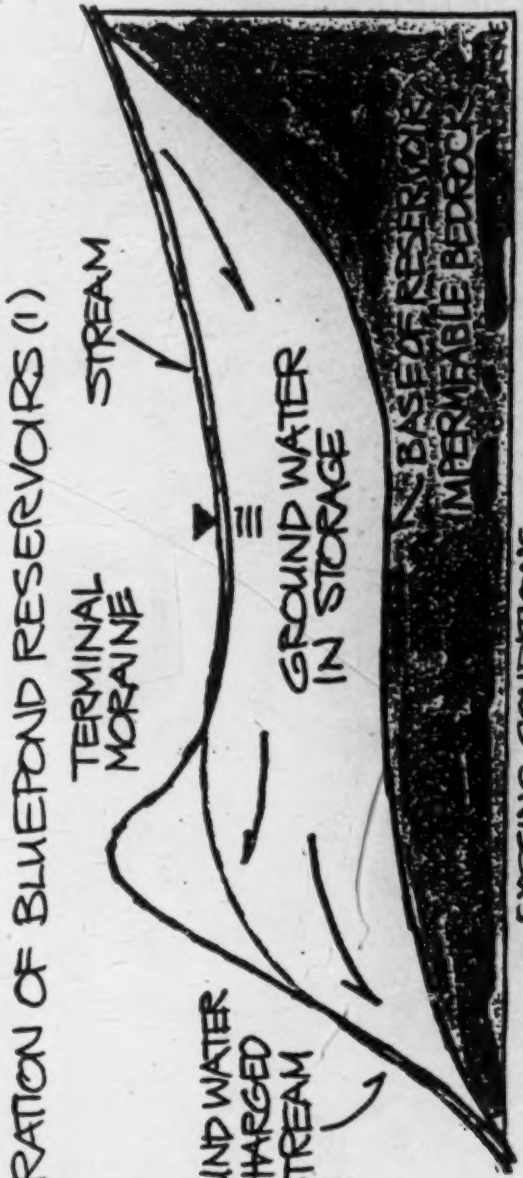
substitute to try to assert ownership without decree and, in lieu of coming into state courts and seeking conditional, and final, decrees for beneficial purposes, as required by law.

All of the foregoing concludes the matters submitted to the Special Water Judge for decision by the Supreme Court of the State of Colorado and in accordance with its Order of April 16, 1979, the foregoing decisions as to common questions of law and claims involved are certified to the Supreme Court.

DONE IN OPEN COURT this 11th day of February, 1981.

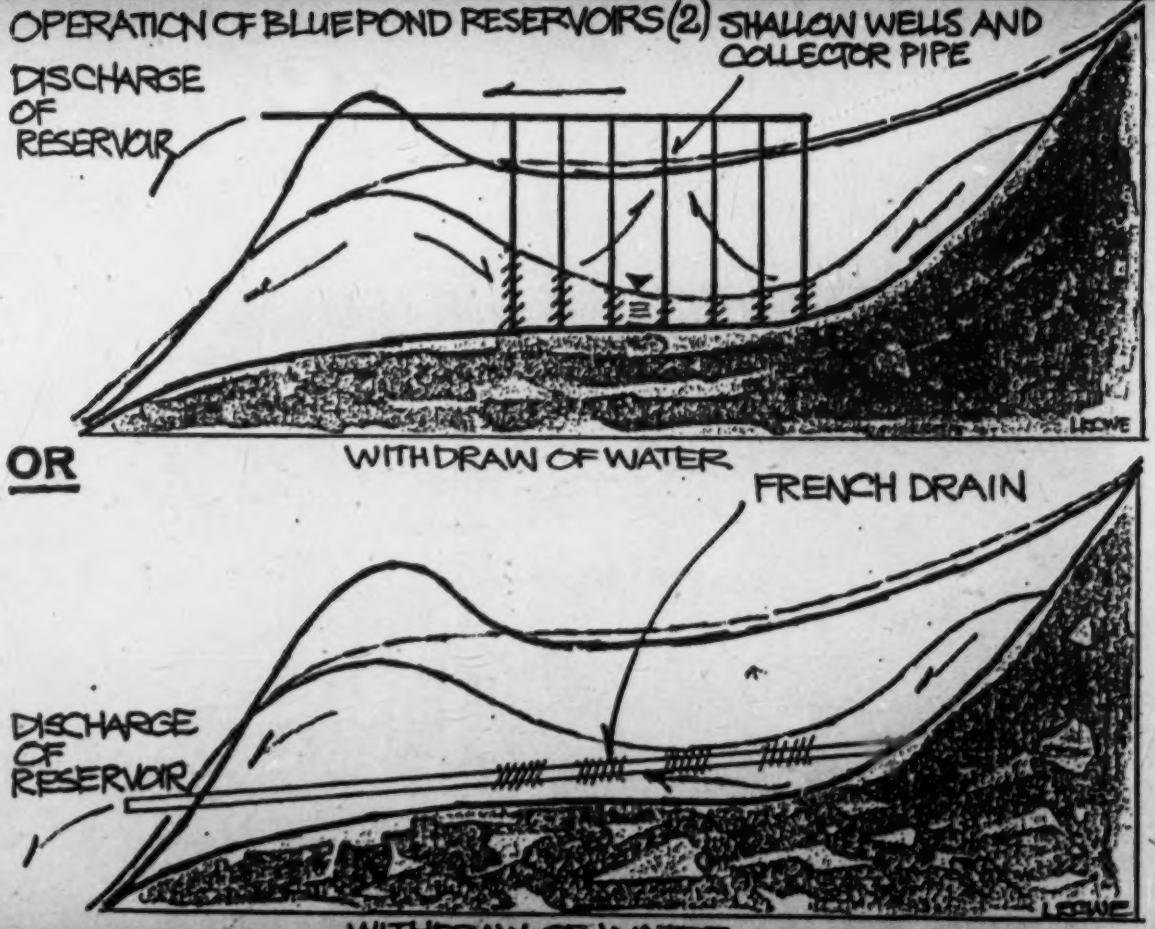
BY THE COURT:

/s/ M. O. Shivers Jr.
SPECIAL WATER JUDGE



APPENDIX A

JOINT VENTURERS' REPLY BRIEF

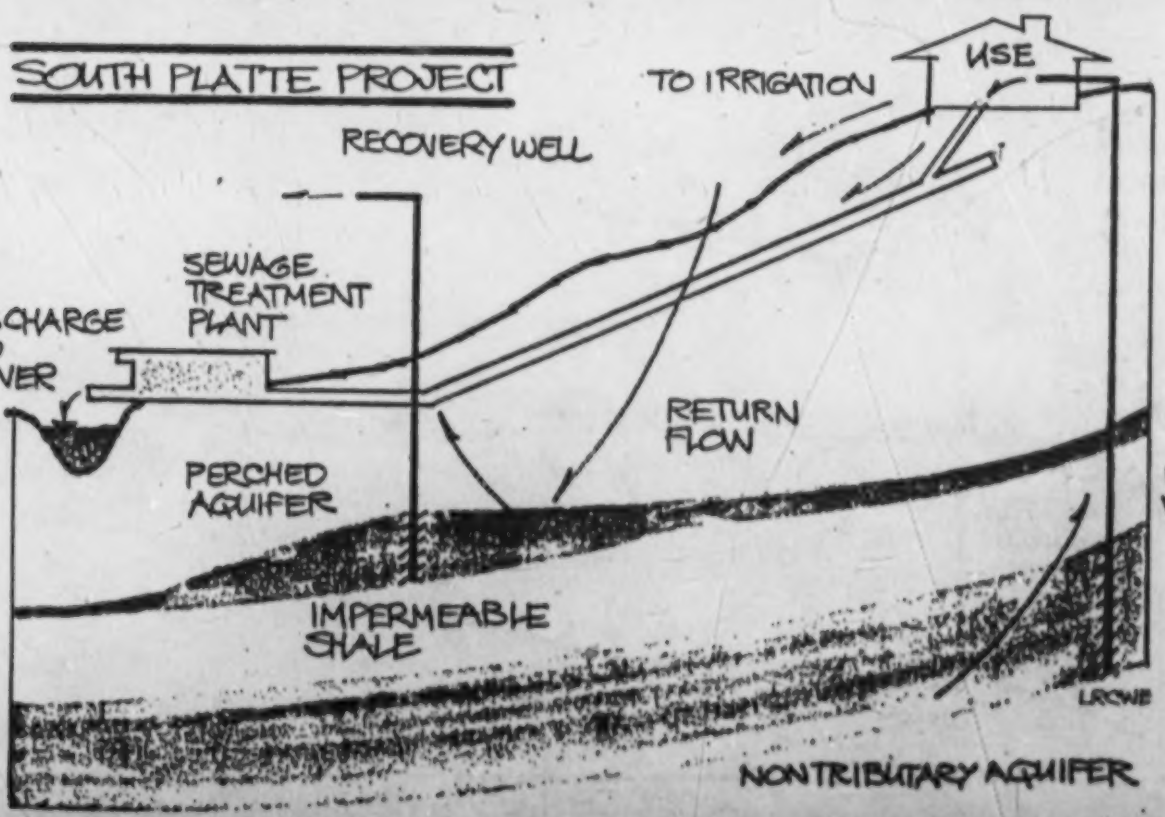

OPERATION OF BLUE POND RESERVOIRS (2) SHALLOW WELLS AND COLLECTOR PIPE
DISCHARGE OF RESERVOIR
LEOWE
WITH DRAW OF WATER
OR
FRENCH DRAIN
DISCHARGE OF RESERVOIR
LEOWE
WITHDRAW OF WATER

OPERATION OF BLUEPOND RESERVOIRS (3)

FILLING THE RESERVOIR

RESERVOIR FULL

SOURCES
NON TRIBUTORY GROUND WATER
DEEP WELL RETURN FLOW
TRANS BASIN WATER
DE MINIMUS TRIBUTARY GROUND WATER
INFILTRATION PROJECT
SEWAGE TREATMENT PLANT
DISCHARGE TO RIVER
INFILTRATION OF RECHARGED GROUND WATER
LRCWE
NON TRIBUTORY AQUIFER


SOUTH PLATTE PROJECT
TO IRRIGATION
USE
RECOVERY WELL
SEWAGE TREATMENT PLANT
DISCHARGE TO RIVER
RETURN FLOW
PERCHED AQUIFER
WELL WITHDRAW
IMPERMEABLE SHALE
LARIMER
NONTRIBUTARY AQUIFER

DENVER BASIN RECHARGE RECOVERY

APPENDIX B

STATE of Colorado, DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WATER RESOURCES, STATE ENGINEER, et al.,

Appellants and Cross-Appellees,

vs.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, et al.,

Appellees and Cross-Appellants,

and

Northern Colorado Water Conservancy District, et al.,

Appellees.

No. 79SA38.

Supreme Court of Colorado, En Banc.

July 18, 1983.

As Modified on Denial of Rehearings Nov. 7, 1983.

LOHR, Justice.

This is an appeal from the judgment of the special water judge appointed by this court to decide questions of law common to numerous applications for determinations of conditional water rights in nontributary ground water[1] outside the boundaries of designated ground water

---

1. As discussed later, some of the applications involve tributary ground water. Our appointment of the special water judge, however, was occasioned by the need to resolve fundamental questions concerning the claims to nontributary ground water. *Southeastern Colorado Water Conservancy District v. Huston*, 197 Colo. 365, 593 P.2d 1347 (1979).

basins in all seven water divisions in the State of Colorado. We affirm in part, reverse in part, and remand the cases to the respective divisions in which they were filed, with directions.

I. PROCEDURAL HISTORY

Late in December of 1978, four separate groups of claimants filed applications for determinations of conditional water rights in tributary and nontributary ground water[2] in some or all of Colorado's seven water divisions.

---

2. A definition of some terms as used in this opinion will prove helpful. "Ground water" or "underground water" means "any water not visible on the surface of the ground under natural conditions." *See* section 37-90-103(19), C.R.S. 1973. In the development of our water law, we have traditionally classified ground water as "tributary" or "nontributary" to a natural stream. *See* Note, *A Survey of Colorado Water Law*, 47 Denver L.J. 226, 308 (1970). Nontributary ground water is that ground water not in or tributary to a natural stream within the meaning of section 37-92-103(13), C.R.S.1973. Tributary ground water consists of "that water in the unconsolidated alluvial aquifer of sand, gravel, and other sedimentary materials, and all other waters hydraulically connected thereto which can influence the rate or direction of movement of the water in that alluvial aquifer or natural stream." *See* section 37-92-103(11), C.R.S.1973. The period of time that will ensue from the removal of ground water until that removal affects the flow of a natural stream is critical in determining whether the ground water is tributary or whether the effect on the stream is so delayed that the water is in effect nontributary. *District 10 Water Users Ass'n v. Barnett*, 198 Colo. 291, 599 P.2d 894 (1979); *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974); *see Hall v. Kuiper*, 181 Colo. 130, 510 P.2d 329 (1973). We have previously noted that particular ground water cannot readily be classified as tributary or nontributary and that the distinction in some cases is only a matter of degree. *E.g., Pioneer Irrigation Districts v. Danielson*, 658 P.2d 842, 845 (Colo. 1983). Although the distinction lacks a satisfying scientific

(Continued on the following page)

Numerous objectors appeared and filed statements of opposition to the applications. In January 1979 certain of the objectors brought an original proceeding in this court under C.A.R. 21 requesting that the cases be consolidated and assigned to a single water judge under the superintending control vested in this court by *Colo. Const.* Art. VI, § 2, cl. 1 for the purpose of resolving questions of law basic to the disposition of all the applications. We issued a rule to show cause why that relief should not be granted, and later made the rule absolute in *Southeastern Colorado Water Conservancy District v. Huston*, 197 Colo. 365, 593 P.2d 1347 (1979).

To implement the rule, we assigned to the special water judge "all matters connected with the pending applications of [applicants John Huston, Allan Leaffer and Wallace Yaffe, d/b/a various John Doe and Richard Roe Joint Ventures; Nedlog Technological Group (Nedlog); Colorado Pacific Energy and Colorado Pacific Aztec (Colorado Pacific); and Bob Johnston, Jr. (Johnston)] which are the subject of this proceeding and which are on file with any of the water clerks of the state." 197 Colo at 376, 593 P.2d at 1354. The chief justice designated Honorable M. O. Shivers, Jr., as the special water judge and assigned him temporarily as an additional water judge

---

(Continued from the previous page)

sharpness, it often has critical legal importance, as the present opinion will demonstrate. For discussions of the interrelation of ground water—both tributary and nontributary—and tributary surface water, see generally Harrison and Sandstrom, *The Groundwater—Surface Water Conflict and Recent Colorado Legislation*, 43 U. of Colo.L.Rev. 1 (1971); Moses, *Basic Groundwater Problems*, 14 Rocky Mtn.Min.L. Inst. 501 (1968); Moses, *The Law of Ground Water—Does Modern Buried Treasure Create a New Breed of Pirates?* 11 Rocky Mtn.Min.L.Inst. 277 (1966).

in each of the seven water divisions for the purpose of the proceeding. *See* section 37-92-203(2), C.R.S. 1973.

The threshold question submitted to the special water judge was whether nontributary waters in Colorado are subject to appropriation (Q1). In the event the judge should answer that question in the affirmative, we directed that he answer the following additional questions of law (Q2-Q5):

> Q2. By what authority can such waters be appropriated?
>
> Q3. Can non-tributary waters outside the boundaries of designated ground water basins be appropriated by persons having no property interest in the surface?
>
> Q4. Can non-tributary waters outside the boundaries of designated ground water basins be appropriated for use by persons other than the claimant or those whom the claimant is authorized to represent?
>
> Q5. Can applications for non-tributary waters outside the boundaries of designated ground water basins be filed (a) without first obtaining permits from the State Engineer and, if so, (b) without first applying for such permits?

197 Colo. at 369-70, 593 P.2d at 1349.

The special water judge caused notice to be given to all applicants and objectors, and selected a trial committee, made up of attorneys for the interested parties,[3] to analyze the applications, divide the claims into classes, and select one claim representative of each class for consideration by the court. In compliance with the court's directions, the trial committee divided the claims into eight classes and

---

3. The trial committee consisted of an attorney for each of the four groups of claimants, one attorney from each water division, an assistant attorney general of the State of Colorado, and an assistant United States attorney.

chose a representative claim from each. The classes are summarized as follows:

CLASS	APPLICANT	WATER DIVISION	NATURE OF CLAIMS
I	Bluepond Associates*	1 through 7	Underground storage rights for tributary water
II	Various Joint Ventures*	1 & 2	Well field projects involving nontributary ground water
III	Central Metropolitan Water Users*	1	Ground water infiltration projects involving both nontributary and tributary ground water
IV	Central Metropolitan Water Users*	1	Claims for unconsumed withdrawals, return flows and waste water from existing wells producing nontributary ground water**
V	Central Metropolitan Water Users*	1	Claims for unconsumed withdrawals, return flows and waste water from existing wells producing nontributary ground water**
VI	Johnston	2	Wells on applicant's property for production of nontributary ground water
VII	Colorado Pacific	7	Wells on properties of others, to produce tributary water at shallower levels and nontributary water at deeper levels
VIII	Nedlog	5 & 6	Wells for production of nontributary ground water from Burns Basin plus certain "lost water" spilling annually from that basin

*Included among the Huston-Leaffer-Yaffe joint ventures.
**It is unclear from the record how class IV and class V claims differ in nature.

After receiving a report from the trial committee indicating that several of the applications could require consideration of additional legal issues, the special water judge submitted a "Request for Clarification" to obtain permission from this court to determine certain supplemental or subordinate questions of law. We granted that request and authorized the court to answer such questions in its discretion. The trial court then considered oral and written argument by the parties and answered the original five questions posed by this court in *Southeastern Colorado Water Conservancy District v. Huston, supra.* The following is a summary of the trial court's written rulings on those questions:

Q1. Nontributary waters are subject to appropriation.

Q2. The authority for appropriation of nontributary water outside a designated ground water basin is section 37-90-137, C.R.S.1973 (1982 Supp.), which provides for issuance of well permits by the state engineer, with review of the state engineer's action to be under section 24-4-106. C.R.S.1973 (1982 Repl. Vol. 10), a part of the State Administrative Procedure Act, in the district court in the county where the well site is situated. This review procedure is prescribed in section 37-90-115, C.R.S. 1973 (1982 Supp.).[4] The right to appropriate such water is also based on *Colo. Const.* Art. XVI, §§ 5 and 6, and judicial recognition of appropriations may be obtained under the Water Right Determination and

---

4. Section 37-90-115 was repealed and reenacted, with amendments, after the special water judge issued judgment in this case, as discussed in part II.A.3. of this opinion.

Administration Act of 1969, article 92 of title 37, C.R.S.1973.

Q3. The appropriation of nontributary ground water outside the boundaries of a designated ground water basin can be accomplished by persons having no property interest in the surface, but only with the consent of the landowner to construct the necessary physical works.

Q4. Nontributary ground water outside designated ground water basins can be appropriated for the use of persons other than the claimant so long as the claim is not speculative under the guidelines of our prior cases, notably *Colorado River Water Conservation District v. Vidler Tunnel Water Co.*, 197 Colo. 413, 594 P.2d 566 (1979); *Bunger v. Uncompahgre Valley Water Users Ass'n*, 192 Colo. 159, 557 P.2d 389 (1976); and *Taussig v. Moffat Tunnel Water & Development Co.*, 106 Colo. 384, 106 P.2d 363 (1940).

Q5. An application for adjudication of a right in nontributary ground water outside a designated ground water basin should not be filed in the water court until a well permit has been issued by the state engineer, or has been denied and appellate processes have been completed, but an exception is appropriate if the priority date for a particular calendar year may be lost by so deferring the filing.

The special water judge then went on to consider each of the eight classes of claims, stating that the rulings on the representative applications may implicitly answer some of the supplemental questions of law but that such questions would not be specifically posed and an-

swered.[5] In ruling upon the individual claims, the judge treated the representative applications as if challenged by motions to dismiss and considered all matters alleged in the applications as if true. With regard to some of the applications, the judge reviewed supplementary information and treated those claims as if challenged by motions for summary judgment. The judge dismissed all class I claims as speculative and infeasible; dismissed all class II claims as speculative and premature, but with leave to renew after well permit proceedings are completed and ownership or landowners' consent for use of well sites is obtained; dismissed all class III claims as reflecting on their faces that the nontributary water is developed water not subject to appropriation by the applicants; dismissed all class IV claims for various reasons as to waters developed by others but denied dismissal of the claims for unconsumed withdrawals, return flows and waste water developed by the applicants; dismissed the class V claims for numerous reasons including speculation; dismissed the class VI claims for all uses except irrigation and stock watering purposes because speculative for other purposes, and limited the quantity allowable to that needed for irrigation and stock water; denied dismissal of the class VII claims but held that neither dust control nor land reclamatiaon, included among the claimed uses for the water, is a beneficial use; and dismissed all class VIII claims as speculative, but with leave

---

5. We do not set forth the supplemental questions here because the trial court did not directly make rulings on them. To the extent that these supplemental questions relate to the claims on appeal and are not included within the original five questions, we mention them at points in this opinion where they are relevant to our discussion.

to file a new application for a "realistic quantity" of water.[6] The applicants have appealed from the dismissal of the class I, II, VI and VIII claims but have not sought review of the orders dismissing the class III, IV and V claims. Additionally, Colorado Pacific challenges the ruling that neither dust control nor land reclamation is a beneficial use with respect to its class VII claims. The special water judge also expressed the view that the United States of America has no reserved water rights associated with federal lands, and the United States asks that we disapprove that statement.

Because we conclude that nontributary ground water is not subject to appropriation under the Colorado Constitution or to adjudication under the Water Right Determination and Administration Act of 1969, article 92 of title 37, C.R.S.1973 (1982 Supp.) (the 1969 Act), we hold that all applications for adjudication of rights to nontributary ground water under the 1969 Act must be dismissed. To the extent that the applications involve claims for tributary waters we conclude that they were properly filed in the water courts for the seven water divisions and should be returned to those divisions for further proceedings.

II. REVIEW OF ANSWERS TO QUESTIONS POSED TO THE SPECIAL WATER JUDGE

We first review the trial court's answers to Q1 and Q2, the two questions that provide the key to disposition

---

6. The trial court's reasons for dismissal of the various claims are capsulized here, and our statement is not intended to describe completely the grounds relied on by the judge to support his rulings.

of most of the claims before the special water judge. We then consider the answers to Q3, Q4 and Q5 to the extent we deem it appropriate to provide guidance for further proceedings on the various claims. We next address the trial court's dismissal of certain claims for tributary water. Finally, we review the trial court's additional rulings that dust control and land reclamation are not beneficial uses with respect to the class VII claims of Colorado Pacific and that the United States has no reserved water rights based on reservations of federal lands.

A. Answers to Q1 and Q2

In answering Q1 and Q2, the special water judge held that nontributary ground water is subject to appropriation, regardless of whether such water is located within a designated ground water basin established under the Colorado Ground Water Management Act, article 90 of title 37, C.R.S.1973 (1982 Supp.) (the 1965 Act). All the claims before the special water judge relate to areas outside designated basins. The court held that the right to appropriate nontributary ground water outside of such basins can be implemented by application for a well permit from the state engineer under section 37-90-137 of the 1965 Act and by adjudication of rights to such water under the procedures set forth in the 1969 Act. While the court explicitly based the right to appropriate nontributary ground water on statutory authority, the special water judge also expressed the opinion that the constitutional right to appropriate water under *Colo. Const.* Art. XVI, §§5 and 6 includes all waters, tributary and nontributary alike, despite the reference in those sections to waters of any "natural stream." Although we agree that section 37-90-137 pro-

vides the authority for obtaining rights to nontributary ground water outside designated basins, we hold that the constitutional right of appropriation and the adjudication procedures of the 1969 Act do not extend to nontributary ground water. We take this occasion to review the history of water law development in Colorado and the present legislative scheme embodied in the 1965 and 1969 Acts to promote a full understanding of the reasons for our answers to Q1 and Q2.

1. *Federal/State/Private Landowner Relationships*

Colorado and the other western states derive their authority to develop a system of water law from the federal government, which once owned substantially all lands now within the boundaries of those states. In the latter half of the nineteenth century, the United States Congress enacted various public land laws for the purpose of encouraging settlement of the western frontier. These laws took many forms, but their common objective was to promote development of the agricultural and mineral resources of the west by granting public domain lands to those who should discover valuable minerals and to others who should settle the vast new country.[7] Encouraged by

---

7. Principal among the early federal statutes for disposition of public lands were the homestead and preemption laws, e.g., Act of May 20, 1862, ch. 75, 12 Stat. 392 (codified as amended at 43 U.S.C. §§ 161 to 263 (1976)) (repealed by the Federal Land Policy and Management Act of 1976, Pub.L. No. 94-579, 90 Stat. 2743-2794 (codified as amended at 43 U.S.C. §§ 1701 to 1782 (1976 & Supp. II 1978))); the mining laws, starting with the Act of July 26, 1866, ch. 262, 14 Stat. 251

(Continued on the following page)

these inducements, miners and other pioneers occupied parts of the arid lands west of the hundredth meridian of longitude before the formulation of federal law or policy concerning rights in water. Many of the mines and farms were remote from natural streams, and "the settlers in this new land quickly realized that the riparian doctrine of water rights that had served well in the humid regions of the East would not work in the arid lands of the West."[8] *California v. United States*, 438 U.S. 645, 653, 98 S.Ct. 2985, 2990, 57 L.Ed.2d 1018 (1978); *see generally California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 55 S.Ct. 725, 79 L.Ed. 1356 (1935) (cited herein as *California Oregon Power Co.*); *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982); *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882). Spurred by the need to obtain water for domestic, irrigation and mining uses, the settlers did not await federal leadership, but instead developed their own laws, customs and judicial de-

---

(Continued from the previous page)

(codified as amended at 30 U.S.C. §§ 21 to 54 (1976)); the Desert Land Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§ 321 to 329 (1976)); and various statutes providing for large land grants to aid in the building of railroads, e.g., the Union Pacific Act of July 1, 1862, ch. 120, 12 Stat. 489 (since repealed). For a history of the federal land grants to aid in the building of a transcontinental railroad concurrent with the development of land west of the hundredth meridian by settlers and miners, see generally *Leo Sheep Co. v. United States*, 440 U.S. 668, 670-677, 99 S.Ct. 1403, 1405-1409, 59 L.Ed.2d 677 (1979).

8. For a discussion of the common law riparian rights doctrine see *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136 (1899); *Atchison v. Peterson*, 87 U.S. 507, 20 Wall. 507, 22 L.Ed. 414 (1874); *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882); Note, *A Survey of Colorado Water Law*, 47 Denver L.J. 226, 231 (1970).

cisions recognizing priority of appropriation, linked to beneficial use of the water, as the basis for obtaining rights to this vital resource. *See California v. United States, supra; California Oregon Power Co.; Jennison v. Kirk,* 98 U.S. 453, 25 L.Ed. 240 (1879); *United States v. City and County of Denver, supra; Coffin v. Left Hand Ditch Co., supra.*

Prior to the enactment of the first mining laws in 1866, the federal government by silent acquiescence approved the rule—evidenced by local legislation, judicial decisions, and customary law and usage—"that the acquisition of water by prior appropriation for a beneficial use was entitled to protection. . . ." *California Oregon Power Co.,* 295 U.S. at 154, 55 S.Ct. at 727; *see Broder v. Natoma Water and Mining Co.,* 101 U.S. 274, 25 L.Ed. 790 (1879); *Basey v. Gallagher,* 87 U.S. 670, 20 Wall. 670, 22 L.Ed. 452 (1875); *Atchison v. Peterson,* 87 U.S. 507, 20 Wall. 507, 22 L.Ed. 414 (1874); *United States v. City and County of Denver, supra.* Then, in a series of acts providing for disposition of parts of the public domain, Congress accorded formal recognition to water rights acquired through local laws and customs and "rejected the alternative of a general federal water law." *United States v. City and County of Denver, supra,* 656 P.2d at 7; *see* Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253 (codified at 30 U.S.C. § 51 (1976));[9] Act of July 9, 1870, ch. 235,

---

9. Section 9 of the Act of 1866 provides in part: whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged

(Continued on the following page)

§ 17, 16 Stat. 217, 218 (codified at 30 U.S.C. § 52 (1976));[10] Desert Land Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§ 321 to 329 (1976)); *Jennison v. Kirk, supra.*

The 1866 and 1870 Acts were not limited to confirmation of appropriative water rights acquired prior to 1866, but "[t]hey reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain." *California Oregon Power Co.*, 295 U.S. at 155, 55 S.Ct. at 728. The Desert Land Act of 1877 made the application of the policy to future appropriations even more explicit. *California Ore-*

(Continued from the previous page)

by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; . . . ch. 262, § 9, 14 Stat. 253 (now codified at 30 U.S.C. § 51 (1976)). The Act of 1866 was not a grant of water rights under federal law. Rather, it was a voluntary recognition by Congress of a pre-existing right based on customary law and constituting a valid claim to its continued use. *California v. United States, supra,* 438 U.S. at 656, 98 S.Ct. at 2991; *California Oregon Power Co.,* 295 U.S. at 155, 55 S.Ct. at 728; *see United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 704-706, 19 S. Ct. 770, 775-776, 43 L.Ed. 1136 (1899); *Jennison v. Kirk, supra; Basey v. Gallagher, supra; Coffin v. Left Hand Ditch Co., supra.*

10. The Act of July 9, 1870, provided that "all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights . . . as may have been acquired under or recognized by [section 9 of the Act of 1866]." Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218 (codified as amended at 30 U.S.C. § 52 (1976)).

gon Power Co., 295 U.S. at 155-156, 55 S.Ct. at 728. In construing the Desert Land Act of 1877 long after it had been implemented by the patenting of large areas of federal lands, the United States Supreme Court noted that "[a]s the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately" and held that "[t]he fair construction of the provision [of the Desert Land Act of 1877] now under review[11] is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named."[12] *California Oregon Power Co.*, 295 U.S. at 162, 55 S.Ct. at 731. *Accord, Ickes v. Fox*, 300 U.S. 82, 57 S.Ct. 412, 81

---

11. The section of the Desert Land Act of 1877 under review in *California Oregon Power Co.* provides for the homesteading of arid public lands

> by [the homesteader's] conducting water upon the same, within the period of three years [after filing a declaration of intent to do so], *Provided however* that the right to the use of water by the person so conducting the same . . . shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. § 321 (1976)).

12. Colorado was included in the group of states to which the Desert Land Act of 1877 was made applicable pursuant to the Act of March 3, 1891, ch. 561, § 8, 26 Stat. 1097.

L.Ed. 525 (1937). This rule extends to lands patented under the homestead and preemption laws as well as those disposed of under the Desert Land Act of 1877. *California Oregon Power Co.* Recently, the United States Supreme Court, in rejecting a claim that ground water is a "valuable mineral" locatable under the mining laws, again expressly recognized that the United States Congress established a "passive" water rights policy in the mining laws of 1866, 1870, and 1872[13] and by that legislation three times affirmed "the view that private water rights on federal lands were to be governed by state and local law and custom." *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 614, 98 S.Ct. 2002, 2008, 56 L.Ed.2d 570 (1978). Moreover, in *California v. United States, supra,* the United States Supreme Court noted that through the history of the relationship between the federal government and the states in the reclamation of the arid lands of the western states "runs the consistent threat of purposeful and continued deference to state water law by Congress." 438 U.S. at 653, 98 S.Ct. at 2990.[14]

---

13. Act of May 10, 1872, ch. 152, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 21 to 54 (1976)).

14. The federal reserved rights doctrine and the prohibition against interference with the navigability of any navigable waters have been recognized as limitations on the right of the states to develop their own water law. *See California Oregon Power Co., supra,* 295 U.S. at 159, 55 S.Ct. at 729; *California v. United States, supra,* 438 U.S. at 662, 98 S.Ct. at 2994; *United States v. Rio Grande Dam & Irrigation Co., supra.* In addition, the United States Supreme Court recently held that federal deference to state water law does not indicate that Congress wished to remove the federal constitutional constraint against the states' placing unreasonable

(Continued on the following page)

Additional congressional recognition of state law as the source of rights to obtain and use water is to be found in the legislative history of the adoption of the McCarran Amendment. In 1952 Congress enacted that amendment, codified at 43 U.S.C. § 666 (1976), providing for the joinder of the United States in judicial proceedings for adjudication or administration of water rights under state law. The Senate Report on the McCarran Amendment recognizes that "[i]n the arid Western States, for more than 80 years, the law has been that the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof." S.Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951).

(Continued from the previous page)

burdens on interstate commerce. *Sporhase v. Nebraska ex rel. Douglas*, — U.S. —, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982); *U.S. Const* art. 1, § 8, cl. 3.

The doctrine of reserved water rights of the United States incident to reservation of federally owned lands for various purposes has a history of its own. We recently explored that history and some of the complexities of the doctrine in *United States v. City and County of Denver, supra*. Leading federal reserved rights cases include *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978); *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963); and *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). In *United States v. New Mexico, supra*, 438 U.S. at 698, 98 S.Ct. at 3013, the United States Supreme Court stated:

> whatever powers the States acquired over their waters as a result of congressional Acts and admission into the Union, however, Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes.

The United States Supreme Court, in *California Oregon Power Co.*, made clear that each state affected by that decision is free to adopt such system for acquisition of water rights as it considers best:

> Nothing we have said is meant to suggest that the [Desert Land Act of 1877], as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since "Congress cannot enforce either rule upon any state," *Kansas v. Colorado*, 206 U.S. 46, 94 [27 S.Ct. 655, 666, 51 L.Ed. 956], the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation. *See Wyoming v. Colorado*, 259 U.S. 419, 465 [42 S.Ct. 552, 557, 66 L.Ed. 999].

295 U.S. at 163-164, 55 S.Ct. at 731-732. Recently, in *California v. United States, supra*, the United States Supreme Court reaffirmed that holding, quoting the above passage in full, except for the first sentence. 438 U.S. at 658, 98 S.Ct. at 2992.[15]

---

15. For additional development of the historical background of the relationship between the federal government and the western states in the development of water law, see *California v. United States, supra*, 438 U.S. at 653-663, 98 S.Ct. at 2990-2995, and *United States v. City and County of Denver, supra*, 656 P.2d at 7-8.

The Congress of the United States authorized the admission of Colorado as a state of the Union in 1876. Enabling Act of Colorado, C.R.S.1973 (1980 Repl.Vol. 1A). The Enabling Act provided for admission of this new state upon "an equal footing with the original states," §§ 1, 5; required disclaimer of "all rgiht and title to unappropriated public lands" in Colorado, § 4, *see Hartman v. Tresise,* 36 Colo. 146, 84 P. 685 (1906); but made no mention of waters.

As the foregoing discussion reflects, federal statutes, as interpreted by the United States Supreme Court, recognize Colorado's authority to adopt its own system for the use of all waters within the state in accordance with the needs of its citizens, subject to the prohibitions against interference with federal reserved rights, with interstate commerce, and with the navigability of any navigable waters. We now examine how that law has developed.

2. *Development of the Law of Tributary Water*

[1] Colorado's water law had its beginnings prior to statehood and, naturally, the law with respect to the use of visible surface waters was the subject of the most extensive early development. The doctrine of priority of appropriation as the source of rights to water in the streams of Colorado was established before our state constitution was adopted, starting "from the date of the earliest appropriations of water within the boundaries of the state." *Coffin v. Left Hand Ditch Co., supra,* 6 Colo. at 446. With the adoption of the Colorado Constitution in 1876, the doctrine was formalized in *Colo. Const.* Art. XVI, §§ 5 and 6, which have continued unamended to this day:

> The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.
>
> The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

Under these constitutional provisions, the right of prior appropriation applies only to "waters of any natural stream." Consistent with the principle of construction that where the language is plain, the meaning clear, and no absurdity is involved, the words of the constitution are to be given their natural meaning, *e.g., People ex rel. Park Reservoir Co. v. Hinderlider*, 98 Colo. 505, 57 P.2d 894 (1936); *Peop'e ex rel. Seeley v. May*, 9 Colo. 80, 10 P. 641 (1885), we have held that the quoted language encompasses only waters in natural streams and all waters tributary thereto. *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), *appeal dismissed*, 421 U.S. 996, 95 S.Ct. 2391, 44 L.Ed.2d 663 (1975); *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963); *see Pikes Peak Golf Club, Inc. v. Kuiper*, 169 Colo. 309, 455 P.2d 882 (1969); *Sa-*

franek v. Town of Limon, 123 Colo. 330, 228 P.2d 975 (1951); *Nevius v. Smith*, 86 Colo. 178, 279 P. 44 (1929).[16]

The general assembly early established a statutory framework for judicial recognition of rights acquired by exercise of the constitutional right to divert the unappropriated waters of natural streams to beneficial uses. Beginning as early as 1879[17] and continuing to the comprehensive treatment found in the 1969 Act, a system has been continuously in place for adjudication of rights to tributary waters under a system of priorities. *See State ex rel. Danielson v. Vickroy*, 627 P.2d 752, 757 (Colo.1981); *Union Colony of Colorado v. Elliott*, 5 Colo. 371, 378-380 (1880). As the science of hydrology developed, the law increasingly took cognizance of the fact that many underground waters are tributary to streams and that withdrawal of water from wells can affect streamflow. *See, e.g., Fellhauer v. People*, 167 Colo. 320, 447 P.2d 986 (1968).[18] One important purpose of the 1969

---

16. The general assembly construed the constitutional right to appropriate in a manner consistent with the cited cases in reenacting section 37-82-101(1) in 1979 to read as follows: The water of every natural stream, as referred to in sections 5 and 6 of article XVI of the state constitution, includes all water occurring within the state of Colorado which is in or tributary to a natural surface stream. The waters of natural streams of Colorado do not include underground waters not in or tributary to natural surface streams nor underground waters which, when withdrawn, do not impair the flow of natural surface streams. Colo.Sess.Laws 1979, ch. 346, 37-82-101(1) at 1366.

17. *See* Colo.Sess.Laws 1879, Act of February 19, 1879, pp. 94-108.

18. Compare, *Fellhauer v. People*, *supra*, with *Medano Ditch Co. v. Adams*, 29 Colo. 317, 68 P. 431 (1902) and *McClellan v. Hurdle*, 3 Colo. App. 430, 33 P. 280 (1983), holding that

(Continued on the following page)

Act was to "integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all of the waters of this state." Section 37-92-102(1), C.R.S.1973 (1982 Supp.). As we have recently indicated, however, the 1969 Act is applicable only to water in or tributary to streams and does not apply to nontributary ground water.[19] *State ex rel. Danielson v. Vickroy, supra; see Danielson v. Kerbs Ag., Inc.*, 646 P.2d 363 (Colo.1982). The basis for this conclusion becomes clear upon careful examination of the 1969 Act.

The proceedings prescribed by section 37-92-302 of the 1969 Act for adjudication of water rights are special proceedings, and their scope is governed by statute. *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980); see C.R.C.P. 81(a); *cf. Colorado River Water Conservation District v. Rocky Mountain Power Co.*, 174 Colo. 309, 486 P.2d 438 (1971), *cert. denied*, 405 U.S. 996, 92 S.Ct. 1245, 31 L.Ed.2d 465 (1972) (water adjudications under predecessor adjudication statute were special statutory proceedings); *Orchard City Irrigation Distict v. Whitten*, 146 Colo. 127, 361 P.2d 130 (1961) (to same effect as *Colo-*

(Continued from previous page)

underground waters supplying a natural stream and underground currents that flow in well-defined channels are governed by the same rules of appropriation as surface streams. These two latter cases indicate an early awareness of tributary underground waters but show an imperfect understanding of the interrelation of surface streams and underground waters.

19. The 1969 Act does not apply to tributary water that is within the definition of designated ground water. *State ex rel. Danielson v. Vickroy, supra.* See section 37-90-103(6), C.R.S. 1973, as amended by Colo.Sess.Laws 1983, ch. —, 37-90-103(6) at — (House Bill No. 1399, approved May 23, 1983) for the definition of designated ground water.

rado River Water Conservation District v. Rocky Mountain Power Co.). To determine what claims are subject to the administrative system and adjudication procedures of the 1969 Act, the statutory provisions for the jurisdiction of the water court and the scope of an adjudication must be read together with the definitions of critical terms employed in those statutes.

Jurisdiction over adjudication of water rights is established in the water court of each water division under section 37-92-203(1), C.R.S.1973:

> There is established in each water division the position of water judge of the district courts of all counties situated entirely or partly within the division. Said district courts collectively acting through the water judge have exclusive jurisdiction of water matters within the division, and no judge other than the one designated as a water judge shall act with respect to water matters in that division. Water matters shall include only those matters which this article and any other law shall specify to be heard by the water judge of the district courts.

The last sentence of this section clearly refers us to other sections of the 1969 Act for definition of those "water matters" properly subject to the jurisdiction of the water court.[20]

---

20. We have held that some matters not explicitily designated to be heard by a water judge are included in water court jurisdiction by necessary implication or can be considered ancillary to the exercise of the water court's jurisdiction. Thus, an action to determine the validity of rules and regulations promulgated by the state engineer under the 1969 Act is within the exclusive jurisdiction of the water judge even though not specified in that act as a water matter. *Kuiper v. Well Owners Conservation Ass'n,* 176 Colo.

(Continued on the following page)

Section 37-92-302(1)(a), C.R.S.1973 (1982 Supp.) prescribes the types of claims that may be filed in the water court:

> Any person who desires a determination of a water right or a conditional water right and the amount and priority thereof, including a determination that a conditional water right has become a water right by reason of the completion of the appropriation, a determination with respect to a change of a water right, approval of a plan for augmentation, quadrennial finding of reasonable diligence, or approval of a proposed or existing exchange of water under section 37-80-120 or 37-83-104, shall file with the water clerk in quadruplicate a verified application setting forth facts supporting the ruling sought, ...

As relevant here, it is a "water right" or a "conditional water right" that is to be determined. These terms have precise definitions, set forth in section 37-92-103(12) and (6), C.R.S. 1973, respectively; as follows:

> "Water right" means a right to use in accordance with its priority a certain portion of the *waters of the state* by reason of the appropriation of the same. appropriation of the same. (Emphasis added.)
> "Conditional water right" means a right to perfect a

(Continued from the previous page)

119, 490 P.2d 268 (1971). Moreover, we have ruled that the 1969 Act implicitly allows water court jurisdiction over a claim to enforce a deed covenant that would affect the outcome of an application for a plan for augmentation pending in that court. *Oliver v. District Court*, 190 Colo. 524, 549 P.2d 770 (1976); see *Perdue v. Ft. Lyon Canal Co.*, 184 Colo. 219, 519 P.2d 954 (1974). Recently, we stated that the water court has authority to make determinations and enter decrees of abandonment of water rights. *Gardner v. State, supra.*

> water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based.

Thus, water rights and conditional water rights relate to "waters of the state," a term defined in section 37-92-103(13) in these words:

> "Waters of the state" means all surface and underground water in or tributary to all natural streams within the state of Colorado, except [designated ground water, defined in section 37-90-103(6)].[21]

Reading these statutory provisions together leads inescapably to the conclusion that the water right determination proceedings authorized by section 37-92-302(1)(a) do not extend to rights in nontributary ground water.[22] *See also* section 37-82-101(1), C.R.S. 1973 (1982 Supp.). This result is implicit in the analysis on which we based our holding in *State ex rel. Danielson v. Vickroy, supra,* that a water judge has no jurisdiction over matters involving designated ground water. *Accord, Pioneer Irrigation Districts v. Danielson*, 658 P.2d 842 (Colo. 1983); *see Ground Water Commission v. Shanks*, 658 P.2d 847 (Colo. 1983);

---

21. The joint ventures and Colorado Pacific argue that the exception of designated ground water from the definition of "waters of the state" implies that nontributary ground water that is not designated ground water is included within that definition. This seriously misreads the statute. "Waters of the state" is expressly limited to tributary water, and the exception of "designated ground water" is appropriate only because some tributary water is included in that defition but is not to be considered part of "waters of the state." *See* section 37-90-103(6), C.R.S.1973, as amended by Colo.Sess.Laws 1983, ch. —, 37-90-103(6) at — (House Bill No. 1399, approved May 23, 1983).

22. *See* note 24 *infra* and accompanying text.

see also Broyles v. Ft. Lyon Canal Co., 638 P.2d 244 (Colo. 1981).[23]

The conclusion that the 1969 Act adjudication procedures do not apply to nontributary ground water is also consistent with our holding in *Whitten v. Coit, supra,* that rights to nontributary ground water could not be adjudicated under the Water Adjudication Act of 1943, 148-9-1 to -27, C.R.S. 1963, which was the predecessor of the 1969 Act. Our conclusion in *Whitten v. Coit, supra,* after reviewing the 1943 act, that "[t]he entire plan of the water adjudication act is based on the concept of 'rivers and natural streams,'" 153 Colo. at 164, 385 P.2d at 135, applies with equal force to the 1969 Act.

Contrary to the plain meaning of the statutory provisions defining the scope of the water court's jurisdiction, some parties to the present action argue that the water court has jurisdiction to adjudicate rights to nontributary ground water outside of designated basins, relying primarily on *Perdue v. Ft. Lyon Canal Co.*, 184 Colo. 219 519 P.2d 954 (1974). In that case we upheld the judgment of a water judge granting a conditional decree for nontributary surface water in a lake and determining that, by reason of a private agreement between the parties, the decree was superior to an earlier decree awarded to other claimants. We rejected an argument that the water court lacked jurisdiction and held, without elaboration, that nontributary water not within the definition of designated ground water is included within the term "wa-

---

23. We have held that *State ex rel. Danielson v. Vickroy, supra,* is to be applied prospectively only. *Ground Water Commission v. Shanks, supra.*

ter matters" under the 1969 Act. Since *Perdue v. Ft. Lyon Canal Co.* involved nontributary surface water only, we decline to interpret its holding as extending to nontributary ground water. Whether we would follow *Perdue* in the future in applying the adjudication procedures of the 1969 Act to nontributary surface water is an issue that we need not address today.[24]

In making the rule absolute in the present case, we cited *Perdue v. Ft. Lyon Canal Co.* for the proposition that the special water judge has jurisdiction to rule on the five questions of law we directed the judge to answer. *Southeastern Colorado Water Conservancy District v. Huston*, 197 Colo. at 370, 593 P.2d at 1350. In so holding, we did not intend to prejudge whether claims for nontributary ground water outside designated basins could be adjudicated under the 1969 Act, but only recognized that the special water judge, whether in his capacity as a water judge or as a district judge, has authority to determine basic questions of appropriability and the law applicable to appropriability in this unique proceeding.

---

24. The state argues in its brief that section 37-82-102, C.R.S. 1973, relating to the prior right of a landowner to nontributary seepage or spring waters arising on his land, makes sufficient though indefinite reference to other governing laws relating to priorities to cause adjudications with respect to priorities in such waters to be included in "water matters" under section 37-92-203(1) of the 1969 Act. Whether the jurisdictional holding in *Perdue* can be supported on that ground we leave for another day.

We note that a considerable body of law developed prior to the 1969 Act in the area of nontributary seepage or spring waters and a landowner's preferred right to such water if capable of being used upon his lands. *See, e.g., Cline v. Whitten*, 144 Colo. 126, 355 P.2d 306 (1960); section 37-82-102, C.R.S.1973.

On other occasions we have reviewed water court decrees adjudicating rights in nontributary ground water outside designated ground water basins. In *Preisser v. Smith Cattle, Inc.*, 190 Colo. 243, 545 P.2d 711 (1976), we upheld a water court decree adjudicating rights to nontributary ground water, apparently not within a designated basin, where the water court's jurisdiction to issue that decree was not questioned. In *Stonewell Estates v. CF & I Steel Corp.*, 197 Colo. 255, 592 P.2d 1318 (1979), we held void a water court decree for nontributary ground water because the published resume of the application upon which the decree was based failed to reflect that the application related to nontributary water. In *Stonewall Estates* we specifically noted that no appeal had been taken from the ruling that the water judge had jurisdiction over nontributary waters. *See also District 10 Water Users Ass'n v. Barnett*, 198 Colo. 291, 599 P.2d 894 (1979); *Wadsworth v. Kuiper*, 193 Colo. 95, 562 P.2d 1114 (1977). We hold today, however, that claims for nontributary ground water outside designated ground water basins cannot be adjudicated under the 1969 Act. To the extent that our earlier cases may be interpreted as ruling to the contrary, we shall not follow them.[25]

---

25. After our original opinion in this case was issued, the General Assembly passed and the Governor signed Senate Bill No. 439 (1983), which amended section 37-92-203(1), expanding the definition of "water matters" which are to be heard by the water courts to include determinations of rights to nontributary ground water outside of designated ground water basins. This legislation is set out in full in our opinion on petitions for rehearing, appended hereto. We express no view on the applicability, validity or effect of this legislation.

3. *Development of the Law of Nontributary Ground Work*

[2] The law governing nontributary ground water has developed more slowly than that with respect to tributary water. *See generally* Note, *A Survey of Colorado Water Law*, 47 Den.L.J. 226, 307-339 (1970); *see also* Hannay, *Recent Developments in Colorado Groundwater Law*, 58 Den.L.J. 801 (1981). Prior to the 1965 Act the Colorado legislature acted only sparingly concerning withdrawals of ground water and did not distinguish between tributary and nontributary waters in legislation on this subject. Thus, in 1887 a general purpose statute[26] was enacted to address prevention of waste from artesian wells and preservation of soil strata information from well bores. Colo.Sess.Laws 1887, Act of April 4, 1887, pp. 52-53. The general assembly repealed that statute in 1953 and replaced it with an act concerning artesian wells and underground water, adopted "to protect and conserve the underground water resources of the state by regulating the construction of wells so as to assure that they are made, maintained, operated and used in a manner which will prevent waste and pollution and which will permit the maximum beneficial use of underground water." Colo.Sess.Laws 1953, ch. 246, § 1, p. 647. The 1953 legis-

---

26. Near the turn of the century the general assembly adopted a number of statutes authorizing and funding the drilling of particular wells for various purposes including irrigation and exploration for minerals. *See, e.g., Colo.Sess.Laws* 1895, chs. 4-6, pp. 29-35. *See also* Colo.Sess.Laws 1935, ch. 80, pp. 242-243, a statute limiting the uses of water from low volume artesian wells to domestic and manufacturing, but excepting a number of acquifers and much of the state from application of the statute. That statute was repealed in 1953. Colo.Sess.Laws 1953, ch. 246, § 17, p. 653.

lation required licensing of well drillers. Colo.Sess.Laws 1953, ch. 246, § 4, p. 648. In 1957, the general assembly passed the Colorado Ground Water Law, repealing the 1953 Act and addresing for the first time the subject of limitation of drilling to protect ground water supplies in critical areas. Colo.Sess.Laws 1957, ch. 289, pp. 863-873. It contained no provisions authorizing adjudication or administration of rights in nontributary ground water, *Whitten v. Coit, supra,* but introduced the requirement that a permit be obtained from the state engineer as a condition to drilling a new well or increasing the supply from an existing well, Colo.Sess.Laws 1957, ch. 289, § 5, p. 869. The 1965 Act in turn repealed the 1957 legislation and established a detailed regulatory scheme for removal of nontributary water within designated ground water basins.[27] *See generally State ex rel. Danielson v.*

---

27. We are aware that wells were drilled for withdrawal of nontributary ground water prior to the 1965 Act, *see, e.g.,* Colorado Department of Natural Resources, *Ground Water Resources of the Bedrock Aquifers of the Denver Basin* 80-99 (1976), and that water courts have issued decrees for nontributary water, *see, e.g., Whitten v. Coit, supra.* The record does not reflect the numbers of these wells and decrees relating to areas outside designated ground water basins, but based on representations in the parties' briefs it appears safe to say they are substantial. The questions of the nature of the rights resulting from such development, the protections to be accorded to the persons who have obtained water from such wells, relying on judicial decree, local custom or administrative acquiescence, and the effect of section 37-90-137 upon those rights, are not before us. Undoubtedly the common law and the statutes in effect from time to time will provide a reservoir of principles adequate to resolve these issues as they may arise. *See, e.g.,* section 37-82-101, C.R.S.1973, adopted in 1969 and later repealed and reenacted in 1979; section 37-90-137(5), adopted in 1983 and

(Continued on the following page)

Vickroy, supra, and the cases collected in n. 7 of that opinion, 627 P.2d at 757.

As previously noted, the 1969 Act was adopted to integrate the appropriation, use and administration of

---

(Continued from the previous page)

set forth in note 42, *infra*. For an early discussion of some of the considerations involved, *see* McHendrie, *The Law of Underground Water*, 13 Rocky Mtn.L.Rev. 1 (1940). The legislature has prescribed no special procedure, other than the well permit process in section 37-90-137, for determination of rights to nontributary ground water outside designated ground water basins. We note that one facet of the nontributary ground water problem—the doctrine of "developed water"—has received extensive treatment in our cases. That doctrine is explained in *Sweetwater Development Corp. v. Schubert Ranches, Inc.*, 188 Colo. 379, 535 P.2d 215 (1975), as follows:

> It has long been the law that the person who produces "developed" water which otherwise would not reach the surface or be tributary to any stream, may appropriate that water if the developer places it to a beneficial use prior to the time any other appropriator uses it. *Platte Valley Irrigation Co. v. Buckers Co.*, 25 Colo. 77, 53 P. 334 (1898). *See also Denver v. Fulton Irrigation Ditch Co.*, 179 Colo. 47, 506 P.2d 144 (1972); *Dalpez v. Nix*, 96 Colo. 540, 45 P.2d 176 (1935); and *Ripley v. Park Center L. & W. Co.*, 40 Colo. 129, 90 P. 75 (1907). Thus, prior to the 1965 Act, a person could obtain a prior right to "developed" water.

188 Colo. at 383, 535 P.2d at 218. *See Cresson Consolidated Gold Mining & Milling Co. v. Whitten*, 139 Colo. 273, 338 P.2d 278 (1959); *Leadville Mine Development Co. v. Anderson*, 91 Colo. 536, 17 P.2d 303 (1932); *Comrie v. Sweet*, 75 Colo. 199, 225 P. 214 (1924); *cf. Pikes Peak Golf Club, Inc. v. Kuiper*, 169 Colo. 309 455 P.2d 882 (1969) (golf course owner had prior right to "salvaged" water collected at its own expense); section 34-50-106, C.R.S.1973. No claims for developed water are before us on appeal.

The subject of judicial recognition of rights to nontributary water outside designated basins and the principles to be applied in establishing the rights of users and adjustment of conflicts among users might benefit from further legislative attention.

tributary ground water and waters in surface streams. Section 37-92-102(1).[28] The 1965 and 1969 Acts deal with separate and mutually exclusive waters, *Broyles v. Ft. Lyon Canal Co., supra,* and, taken together, create a comprehensive system for the utilization of all water in or tributary to natural streams and all nontributary ground water.[29]

The 1965 Act provides for the creation of designated ground water basins and acquisition of rights to nontributary ground water therein under a modified form of prior appropriation to permit full economic development of designated ground water. Section 37-90-102, C.R.S. 1973; *State ex rel. Danielson v. Vickroy, supra.* The legislature adopted a modified rather than a pure form of prior appropriation in recognition of the hydrologic differences between tributary and nontributary water. *See* Colorado Legislative Council, *Water Problems in Colorado,* Research Publ. No. 93 (November 1964). Tributary waters are not subject to eventual depletion because they are annually replenished, and the vested rights of senior appropriators can be fully protected by seasonal regulation of diversion by junior appropriators. Nontributary

---

28. For a general discussion of the complexities of integrated administration of surface streams and tributary ground water, see Carlson, *Has the Doctrine of Appropriation Outlived its Usefulness?,* 19 Rocky Mtn.Min.L.Inst. 529 (1974); Comment, *Appropriation and Colorado's Ground Water: A Continuing Dilemma?,* 40 U. of Colo.L.Rev. 133 (1967). This same subject is discussed, and the legislative history of the 1969 Act is outlined, in Hillhouse, *Integrating Ground and Surface Water Use in Appropriation State,* 20 Rocky Mtn. Min.L.Inst. 691 (1975).

29. We express no opinion as to the applicability of either the 1965 Act or the 1969 Act to nontributary surface water.

ground water supplies, however, may dwindle because water can be withdrawn from the aquifers in excess of the recharge rate, causing a "mining condition." *See Thompson v. Colorado Ground Water Commission,* 194 Colo. 489, 575 P.2d 372 (1978); *Fundingsland v. Colorado Ground Water Commission,* 171 Colo. 487, 468 P.2d 835 (1970). Curtailing diversions by junior appropriators in inverse order of priority does not provide a satisfactory method of protecting senior appropriators of nontributary ground water, for cessation of diversions from one well does not immediately make available an equivalent amount of water at another. Rather, the effect of one well on another is dependent upon such factors as the distance between the wells, the rate of withdrawal, and the transmissivity of the aquifer. *See Whitten v. Coit, supra; Water Problems in Colorado, supra.* Under the system established by the 1965 Act, rights to designated ground water may be acquired only if unappropriated water is available and the proposed appropriation will not unreasonably impair existing water rights or create unreasonable waste. Section 37-90-107(4), C.R.S.1973 (1982 Supp.); *Fundingsland v. Colorado Ground Water Commission, supra* ("availability" of unappropriated water is related to unreasonable impairment of existing rights in an aquifer where water withdrawals are causing a mining condition).

In contrast to the detailed legislative treatment accorded to designated ground water, the only provisions by the general assembly with respect to withdrawal of nontributary ground water outside designated basins are the limited ones found in section 37-90-137 of the 1965

Act.[30] Except for subsection (4), the provisions of section 37-90-137 apply to wells tapping tributary sources as well as those withdrawing nontributary water. We have held that section 37-90-137 of the 1965 Act provides legislative authority for drilling wells outside the boundaries of designated ground water basins. *Broyles v. Ft. Lyon Canal Co., supra.* Subsection (4) of that section, enacted in 1973 as Senate Bill 213,[31] establishes specific criteria to be applied by the state engineer in determining whether to issue a permit for a well tapping an aquifer containing nontributary water.[32]

[3] The special water judge ruled that any affected party dissatisfied with the action of the state engineer on an application for a well permit under section 37-90-137 may obtain review of that decision under sections 37-90-115, C.R.S.1973 (1982 Supp.) and 24-4-106, C.R.S.1973 (1982 Repl.Vol. 10). We believe that the trial judge was correct under the statutes in effect prior to the repeal and

---

30. The subject of withdrawal of nontributary water by wells has been characterized as the "neglected stepchild" of our water law. Carlson, *Has the Doctrine of Appropriation Outlived its Usefulness?*, 19 Rocky Mtn.Min.L.Inst. 529, 552 (1974).

31. Colo.Sess.Laws 1973, ch. 441, § 1, p. 1520.

32. Section 37-90-137(4) provides in pertinent part:

> [I]n considering whether the permit shall be issued, only that quantity of water underlying the land owned by the applicant or by the owners of the area, by their consent, to be served is considered to be unappropriated; the minimum useful life of the aquifer is one hundred years, assuming that there is no substantial artificial recharge within said period; and no material injury to vested water rights would result from the issuance of said permit. The state engineer may adopt rules and regulations to assist in, but not as a prerequisite to, the granting or denial of permits to construct wells and for the administration of this underground water.

reenactment of section 37-90-115 by Colo.Sess.Laws 1983, ch. —, 37-90-115 at — (House Bill No. 1310, approved June 10, 1983) (the 1983 Revision). We first address the law as it existed before the adoption of the 1983 Revision and then consider the effect of that new legislation.

A number of parties vigorously assert that review of the state engineer's decision with respect to issuance of a well permit for nontributary water must be sought in the water court because it involves a "water matter." This position, however, is squarely contrary to section 37-90-115, as it read prior to the 1983 Revision. That section provided:

> Any party, including ground water management districts, adversely affected or aggrieved by *any action of the* ground water commission or the *state engineer under the provisions of this article* may obtain judicial review of such action pursuant to the provisions of section 24-4-106, C.R.S.1973, except that venue shall lie in the county in which the water rights are located. (Emphasis added).

Cf. section 37-90-114, C.R.S.1973 (geenral assembly used explicit language when it wished to exclude state engineer action from review by ground water commission). Furthermore, as previously mentioned, the entire plan and purpose of the 1969 Act is to provide a framework for adjudication and administration of *tributary* waters.

Some of the objectors argue that the state engineer's procedures for issuance of well permits are so informal that judicial review under section 24-4-106 will not be feasible because of the inadequacy of the record. Should this be so, we believe that the appropriate remedy will be a remand to the state engineer with directions to proceed in a manner that will produce a sufficient record to per-

mit implementation of effective administrative review. In any event the asserted deficiency in administrative procedures is not a basis to ignore the review procedure plainly prescribed by section 37-90-115 and to authorize in its stead a review of the state engineer's action by the water court under the 1969 Act.

The 1983 Revision repealed section 37-90-115 and reenacted it to provide, in relevant part:

> Any party, including a ground water management district, adversely affected or aggrieved by any decision or act of the ground water commission under the provisions of this article or by a decision or act of the state engineer under section 37-90-110[33] may take an appeal to the district court in the county wherein the water rights or wells involved are situated.

The 1983 Revision is silent concerning review of actions of the state engineer under section 37-90-137, providing for issuance or denial of well permits. This recent legislation was enacted after the trial court entered judgment and so was not considered by the special water judge. The effect of the 1983 Revision procedures for review of state engineer action under section 37-90-137 was not briefed or argued before this court. Accordingly, we believe it prudent to express no opinion on the question of

---

33. Section 37-90-110, C.R.S.1973 empowers the state engineer to require all flowing wells to be equipped with valves, to require all wells to be constructed and maintained so as to prevent waste, to inspect wells, to order cessation of well use pending correction of defects, to commence actions to enjoin the illegal opening or excavation of wells or withdrawal or use of water therefrom, and to take action to enforce compliance with regulations, controls, or orders of the ground water commission.

review of state engineer action under section 37-90-137 subsequent to the effective date of the 1983 Revision.

[4] An additional question with respect to water court review of state engineer action on well permit applications may arise in connection with proceedings in water court to determine whether water is tributary or nontributary. We believe that, by necessary implication under the 1969 Act, the water court can entertain a proceeding to establish whether water outside the boundaries of designated ground water basins is tributary, so that rights may be obtained by appropriation and confirmed by adjudication under the 1969 Act, or nontributary, so that the well permit criteria of section 37-90-137(4) apply.[34] *Cf. Gardner v. State, supra* (applications for determination of abandonment of water rights are within the water court's jurisdiction); *District 10 Water Users Ass'n v. Barnett, supra* (water court's jurisdiction to determine whether water is tributary was assumed in a case where the jurisdictional issue was not raised); *Kuiper v. Well Owners Conservation Ass'n, supra* (action to determine validity of state engineer's rules and regulations with respect to administration under the 1969 Act is within water court jurisdiction). Such a procedure will permit this matter of central importance to the identification of water subject to adjudication and administration under the 1969 Act to be resolved by the water judges in a hearing in which all interested parties will

---

34. See note 20, *supra*.

have notice and an opportunity to participate.[35] *See* section 37-92-302. We do not believe, however, that such a proceeding provides a basis for the water court to review the state engineer's action on an application for a well permit relating to nontributary ground water under section 37-90-137(4). A holding to the contrary would allow this procedure to swallow the rule so clearly established by section 37-90-115, prior to the 1983 Revision, that administrative review of state engineer action with respect to well permits should proceed under section 24-4-106.[36]

---

35. We recognize the potential for conflict between water court determinations of tributariness and determinations made by the state engineer under section 37-90-137 and reviewed by a district court under section 24-4-106, prior to the 1983 Revision. We reserve for another day the question how any such conflict should be resolved. Compare *State ex rel. Danielson v. Vickroy, supra,* in which we held that "it is appropriate as a matter of policy, and is consistent with legislative intent, to require that any relief sought which involves the taking of ground water in a designated ground water basin must be sought first through the administrative and judicial channels, as appropriate, prescribed for resolution of questions arising under the [1965 Act]." 627 P.2d at 760. The possibility of conflicts with respect to determinations of tributariness under the well permit procedures and the 1969 Act is a subject that might well benefit from attention by the general assembly.

36. It is unnecessary in the present proceeding to determine the effect of section 37-92-305(6), C.R.S.1973 upon the pre-1983 Revision procedure for review of state engineer action on applications for well permits to tap tributary ground water. We note the tension between the function of the water judge in adjudicating claims involving tributary water wells, see sections 37-92-302(2) and 37-92-305(6), and the procedures for review of state engineer action prescribed in section 37-90-115, prior to the 1983 Revision, but express no opinion on that subject. *See Bohn v. Kuiper,* 195 Colo.

(Continued on following page)

[5] A number of the objectors argue that provisions for issuance of well permits to extract nontributary ground water outside designated basins under the 1965 Act are inconsistent with or constrained by the landowners' property rights in such water underlying their lands. The proponents of this view argue that this water was not "severed from the realty at the time the federal government patented the lands to private owners. This argument is answered by our previous discussion of the federal scheme for transfer of public domain lands, whereby the states were granted broad authority to provide for the use of nonnavigable waters within their borders. Also relevant to the conclusion that the United States did not convey the ground water with the land is "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 116, 77 S.Ct. 685, 687, 1 L.Ed2d 693

(Continued from the previous page)

17, 575 P.2d 402 (1978) (we reversed a conditional water right decree granted after the state engineer denied a well permit; no issue was raised as to the possible applicability of section 37-90-115). Section 37-92-305(6) provides:

> In the case of an application for determination of a water right or a conditional water right, a determination with respect to a change of a water right or approval of a plan for augmentation, which requires construction of a well, the referee or the water judge, as the case may be, shall consider the findings of the state engineer, made pursuant to section 37-90-137, which granted or denied the well permit, and may grant a conditional decree unless a denial of such permit was justified under said section, and in case a final decree or conditional decree is granted by the court, the state engineer shall issue said permit.

(1957) (quoted with approval in *Watt v. Western Nuclear, Inc.*, — U.S. —, —, 103 S.Ct. 2218, 2231, 76 L.Ed2d 400 (1983).

Proponents of the private ownership theory also argue that *Whitten v. Coit, supra,* dictates the result for which they contend.[37] We do not agree for two reasons. First, the language of *Whitten v. Coit* upon which the case for private ownership of nontributary ground water is predicated was not necessary to the decision, and we are not bound by it. *See, e.g., Radke v. Union Pacific Railroad Co.*, 138 Colo. 189, 334 P.2d 1077 (1958); *Parker v. Plympton*, 85 Colo. 87, 273 P. 1030 (1928). Second, and more importantly, we believe that, given the state's penary control over development of water law, the traditional property concept of fee ownership is of limited usefulness as applied to nontributary ground water and serves to mislead rather than to advance understanding in considering public and private rights to utilization of this unique resource.

In *Whitten v. Coit,* we held that a district court decree adjudicating priorities to nontributary ground water under the procedures of the Water Adjudication Act of 1943 was void for lack of jurisdiction because that Act, like the 1969 Act, applies only to tributary water. While the question of a landowner's interest in nontributary

---

37. Most of the private ownership proponents concede that section 37-90-137(4) is supportable as a reasonable regulation of property usage, analogous to zoning laws. The private ownership question, however, has implications for the extent of permissible state legislation with respect to nontributary ground water. The issue has been fully and admirably briefed, and we elect to address it as necessary to a full development of the answers to Q1 and Q2.

water underlying his property was not before us, we cited with approval the following passage from an article by William R. Kelly in 31 Rocky Mountain Law Review 165, 171 (1959):

> The landowner has property in the water in his soil. It is a vested right which cannot be taken away by mere legislation. It is subject only to the reasonable use doctrine. If the ground water is in motion so as to be tributary to a natural stream, or part of the stream water table, it has always been subject to priorities of appropriation on the natural stream. But unless it is tributary to the natural stream, it is not subject to the law of appropriation.

153 Colo. at 174, 385 P.2d at 140. The author stated this conclusion as a doctrinal base to legitimize the long-existing practice of farmers to sink wells on their property and to make reasonable use of the ground water. To the extent the concept of the landowner's property right extends no further than to recognize a basis in law to support this past practice, in absence of statutory or constitutional constraints, we find it unexceptionable. *See Town of Chino Valley v. City of Prescott,* 131 Ariz. 78, 638 P.2d 1324 (1981), *appeal dismissed,* — U.S. —, 103 S.Ct. 199, 74 L.Ed2d 160 (1982). To the extent, however, that it is understood to recognize in a landowner an interest in nontributary water coextensive with rights of ownership of other interests in real property we consider the description inaccurate and now repudiate it.[38]

---

38. One of the supplemental questions that we authorized the trial court to consider was:

(Continued on following page)

When Congress elected to patent land separately from water and to allow the states "to legislate in respect of waters and water rights as they deem wise in the public interest," *California Oregon Power Co.*, 295 U.S. at 163, 55 S.Ct. at 731, it made no distinction between tributary and nontributary waters. *See generally Andrus v. Charlestone Stone Products, Inc., supra; California v. United States, supra; California Oregon Power Co.; United States v. City and County of Denver, supra.*[39]

(Continued from previous page)

Is the owner in fee of the surface land also the owner of the non-tributary ground water lying under the land by virtue of his capacity as an owner or is such water to be claimed and decreed in accordance with the doctrine of appropriation by such owner?

The special water judge expressed the view that a landowner does not have fee ownership in nontributary water underlying his property but has a first right of development because landowner consent is essential to obtain rights in such water, as set forth in the trial court's answer to Q3. We do not reach Q3, and we analyze the ownership question differently than did the trial judge, as explained in this opinion.

39. The New Mexico Court has held that the patents from the United States to public lands issued after 1866, and particularly those issued after the Desert Land Act of 1877, . . . conveyed no interest in, or right to, the use of surface or underlying water with which lands could be irrigated, except such portions thereof as were used to reclaim the particular land applied for under the Act.

State ex rel. Bliss v. Dority, 55 N.M. 12, 19-20, 225 P.2d 1007, 1012 (1950). Noting that the Desert Land Act of 1877 "provided that all waters *upon* the public lands (except navigable waters) were to remain . . . free for the appropriation and use of the public," that court held, "[i]t was not intended to be taken literally that such waters must be upon the surface of the earth to be subject to such use." (Emphasis in original.) 55 N.M. at 27, 225 P.2d at 1016. Furthermore, in light of the extensive line of United States Supreme Court cases acknowledging the authority of the states to adopt their own systems of water law, we find unconvincing the argument of objector

(Continued on following page)

Until the enactment of the 1965 Act and the subsequent amendment of that act by addition of section 37-90-137(4), the general assembly had exercised only minimally its power to create law governing the acquisition of rights in nontributary water. *See* Colorado Ground Water Act of 1957. Nor, until the *Whitten v. Coit* dictum, had this court definitively announced any common law with respect to rights in nontributary water. Indeed, in *Safranek v. Town of Limon, supra,* a case not cited in that portion of *Whitten v. Coit* discussing the nature of ownership rights in nontributary ground water, we voiced doubt about the nature of the rights that should be recognized in this resource, expressed disapproval of the doctrine of ownership of such waters by the surface owner, and expressly reserved for future determination the nature of the rights to be recognized in nontributary water.[40] We note that

---

(Continued from previous page)

CF & I Steel Corporation and others that the Pittman Underground Water Act, 43 U.S.C. §§ 351 to 360 (1976) (repealed by Pub.L. No. 88-417, 78 Stat. 389 (1964) and Pub.L. No. 94-579, 90 Stat. 2789 (1976)), relating to issuance of permits to explore for ground water in arid lands owned by the United States in Nevada, reflects that the policy of allowing the states to develop their own systems of water law is inapplicable to nontributary ground water.

40. In *Safranek v. Town of Limon, supra,* we said:

> Had it been established by the record in this case that the water diverted by the town was nontributary ground water, such as an underground lake, the waters of which are not a part or source of a natural stream, still the above-quoted statement upon which counsel for respondents base their claim for ownership of the water would not be a correct statement of Colorado law. [The statement referred to is: "In this State percolating subsurface waters, not tributary

(Continued on following page)

other states with scarce water supplies have rejected an absolute private ownership theory with respect to ground water. *Town of Chino Valley v. City of Prescott, supra; Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973); *State ex rel. Bliss v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950), *appeal dismissed*, 341 U.S. 924, 71 S.Ct. 798, 95 L.Ed. 1356 (1951); *Baeth v. Hoisveen*, 157 N.W.2d 728 (N.D.1968); *Knight v. Grimes*, 80 S.D. 517, 127 N.W.2d 708 (1964); *cf. Williams v. City of Wichita*, 190 Kan. 317, 374 P.2d 578 (1962), *appeal dismissed*, 375 U.S. 7, 84 S.Ct. 46, 11 L.Ed.2d 38 (1963) (same result in riparian rights state not subject to Desert Land Act of 1877); *J.J.N.P. Co. v. State*, 655 P.2d 1133 (Utah 1982) (same result based on statute.). We believe that the Colorado legislature in enacting the 1965 Act and adding

---

(Continued from previous page)

> to any stream, are the property of the owner of the land, as at common law." 123 Colo. at 334, 228 P.2d at 977]. We have long since departed from the English common-law doctrine of ownership of percolating waters by the surface owner, *Nevius v. Smith, supra*, and we would, in such case, be confronted with the question upon which there is an absence of statutory law in Colorado as well as of direct decision by our courts. Whether in such case we should follow the California doctrine of reciprocal rights, developed from its law of riparian rights, or whether we should extend one step further our Colorado doctrine of first in time, first in right, need not now be determined. The question is neither argued nor presented by the facts before us, ...

Safranek v. Town of Limon, supra, 123 Colo. at 335-336, 228 P.2d at 978. The subject of the nature and source of rights in nontributary ground water has provided fertile soil for law review commentary. *See, e.g.*, Martz, *Who Has the Better Right to Non-Tributary Ground Waters in Colorado—Landowner or Appropriator?*, 31 Dicta 20 (1954); McHendrie, *The Law of Underground Water*, 13 Rocky Mtn.L.Rev. 1 (1940).

section 37-90-137(4) exercised its power—long recognized but previously virtually dormant—to legislate concerning nontributary waters.[41] The state interest in providing a system for utilization of this depleteable and vital resource can scarcely be doubted. *See California Oregon Power Co.*, 295 U.S. at 165, 55 S.Ct. at 732; *Town of Chino Valley v. City of Prescott, supra; Knight v. Grimes, supra.* The legislative action reflected in the 1965 Act and section 37-90-137(4) is fully sanctioned by the long-continuing policy of Congress to allow the states to develop their own water law, and is not constrained by any claimed private rights of ownership derived under federal patents.

We recognize, however, that many landowners may have come to rely on wells tapping nontributary sources based on local custom, well permits, and judicial decrees. We express no opinion on the scope of those rights or the extent to which the 1965 Act, including section 37-90-137(4), can be applied to limit them. We believe those

---

41. In 1979 the general assembly expressly asserted that it has the power to legislate with respect to administration and use of nontributary waters. Section 37-82-101(1), C.R.S. 1973 (1982 Supp.), provides in pertinent part:

> All waters not in or tributary to a natural stream . . . shall be subject to such administration and use as the general assembly may provide by law.

This repealed and reenacted a 1969 Act suggesting that such waters were subject to appropriation. Section 37-82-101, C.R.S.1973, based on Colo.Sess.Laws 1969, ch. 373, § 2, p. 1219.

questions must be answered in the context of specific facts developed in contested cases.[42]

4. *Summary of Our Resolution of Q1 and Q2 and Resulting Disposition of Claims*

The foregoing exposition of the development of Colorado water law and the present statutory scheme provides the reasoning behind our answers to the key questions Q1 and Q2, which we now summarize. Nontributary ground water is not subject to appropriation under *Colo. Const.* Art. XVI, §§ 5 and 6, or to adjudication or administration under the 1969 Act. The modified doctrine of prior appropriation provided for in the 1965 Act applies to nontributary ground water, and rights to such water in designated ground water basins must be obtained through the procedures established in that Act. Rights to nontributary ground water not located in a designated basin may be obtained only through application for a well permit from the state engineer under section 37-90-137 of the 1965 Act. Review of the state engineer's action on well permit applications could be obtained under section 24-4-106, as prescribed by section 37-90-115, for appeals taken before the 1983 Revision became applicable. We express no opinion on the proce-

---

42. In 1983 the general assembly amended section 37-90-137 by the addition of subsection (5), which relates to the applicability of section 37-90-137(4) to certain early wells. Colo. Sess. Laws 1983, ch. —, 37-90-137(5) at — (House Bill No. 1440, approved May 23, 1983). That legislation provides:

> Any right to the use of ground water entitling its owner or user to construct a well, which right was initiated prior to July 6, 1973, as evidenced by an unexpired well permit issued prior to July 6, 1973, or a current decree, shall not be subject to the provisions of subsection (4) of this section.

dure for review of state engineer action under the section 37-90-137 after the 1983 Revision was enacted.

Because adjudication procedures in the 1969 Act do not apply to nontributary ground water, all of the applications for determinations of rights in such water filed in the water court and consolidated for the purposes of the present case must be dismissed. Leave should be granted, however, to amend those applications to seek a determination from the respective water judges as to the tributary or nontributary nature of the water sought, should the parties wish to request such determinations. All of the applications for tributary water were properly filed in water court under the provisions of the 1969 Act, and such claims are remanded to the respective water divisions for further proceedings. That part of the trial court's ruling allowing remand of claims for tributary water is affirmed, and that part dismissing tributary water claims is reversed for the reasons set forth in part III of this opinion.

B. Disposition of Q3 through Q5

Our disposition of the issues presented by Q1 and Q2 makes it unnecessary to consider the remaining three questions. In answer to Q3, the special water judge ruled that a person having no property interest in the surface of the land may appropriate nontributary water underlying it only with the consent of the landowner to erect and operate the necessary physical works for extraction of the water. Responding to Q4, the judge held that nontributary ground water outside designated basins may be appropriated for use by persons other than the claimant, but that the appropriator must have beneficial uses at

hand, existing actual need, or a contract or agency relationship with those having such existing need and beneficial uses in mind. In light of our dismissal of all applications filed in the water court for adjudication of rights to nontributary ground water outside of designated basins, we decline to express any view on the issues raised by Q3 and Q4 because our statements would be merely advisory. We recognize that these questions could become relevant in the context of specific applications that may be refiled with the state engineer. However, absent concrete factual contexts for application of these legal questions, we decline to answer them in the abstract because of the impossibility of foreseeing and providing for every possible type of arrangement between applicants and landowners or between applicants and users of the water. *See generally, Illinois v. Gates*, — U.S. —, —, 103 S.Ct. 2317, 2325, 76 L.Ed.2d 527 (1983).

[6] The remaining question, Q5, poses the issue of whether applications for nontributary ground water outside of designated basins may be filed without first obtaining a permit from the state engineer. The special water judge held that applications for nontributary ground water must follow a procedure whereby the applicant first obtains a well permit from the state engineer, or secures appellate reversal of the state engineer's denial of a permit, and then files an application in an adjudication proceeding in water court under the 1969 Act. Further, the special water judge held that if it clearly appears that the priority date for a particular calendar year may be lost (*see* section 37-92-306, C.R.S. 1973), then the application could be filed in water court and the hearing deferred until the state engineer acts and appellate procedures are

concluded. Contrary to the ruling of the special water judge, we hold that the procedures of the 1969 Act do not apply to nontributary ground water outside designated basins and that the only statutory means available for obtaining rights to such water is application for a well permit from the state engineer under section 37-90-137.

[7] The trial judge applied his answer to Q5 to the class VII claims for tributary ground water in remanding such claims for further proceedings in Division 7. This ruling may cause confusion on remand because Q5 relates only to nontributary ground water, so we elect to clarify the procedures required in securing a determination of water rights in tributary ground water. Section 37-92-302(2) provides that the water court shall not enter a decision on an application for determination of a water right requiring the construction of a well until the claimant supplements the application with a permit to construct a well, issued by the state engineer under section 37-90-137, or evidence of its denial or of failure of the state engineer to grant or deny the permit within six months. We do not read this statute to require the applicant to obtain the well permit prior to filing an application in water court. The claimant may file in the water court to protect his priority date while an application to construct a well is pending before the state engineer. The water court is merely prohibited from entering a final decision on that application before the state engineer's decision is rendered or that official fails to grant or deny a permit within six months after application is made. This construction of section 37-92-302(2) is consistent with section 37-92-305(6), which requires the water court to consider the findings made by the state engineer in that official's

decision to grant or deny the well permit.[43] Accordingly, the water court is not deprived of jurisdiction over the class VII claims for tributary water on remand even if applications for well permits under section 37-90-137 are still pending at that time.

III. TRIBUTARY GROUND WATER CLAIMS

[8] We now consider the trial court's dismissal of those applications for tributary ground water that are appealed. Because we conclude that the claims for nontributary ground water must be dismissed for lack of jurisdiction in the water court, we need not consider the other grounds for their dismissal relied on by the special water judge. However, since the claims for tributary water were filed in the correct forum, we are required to review the trial court's reasons for dismissing them.

The representative claims from classes I, III and VII seek determination of rights to tributary ground water as well as to nontributary ground water. The class VII claims for tributary water were not dismissed. Of the remaining two classes, only the joint venture Bluepond Associates, the applicant for all seventy-two claims comprising class I, appeals the trial court's dismissal of its applications for tributary water. By reason of the procedure employed by the special water judge for classifying all of the applications into eight groups and choosing to review only a representative claim from each, it is not clear

---

43. As earlier mentioned, there is a tension between section 37-90-115, as it read prior to the 1983 Revision, prescribing review of state engineer well permit decisions under section 24-4-106, and section 37-92-305(6), requiring a water judge to consider such decisions before entering a decree for a water right involving diversion by well. See note 36, *supra*.

from the record whether applications for tributary water were included within some of the other classes and inadvertently dismissed in the trial court's ruling on the representative claims. To avoid prejudice resulting from possible inadvertent dismissal of such claims, our disposition of the class I applications for tributary water applies as well to all other applications involving tributary water that were dismissed by the trial court and appealed by the claimants.

The class I claimant requests decrees for underground water storage where a naturally occurring glacial terminal moraine creates an underground dam. Each storage area lies directly under a surface flowing river or stream. The claimant proposes to withdraw the water presently held in these underground reservoirs, release it into the overlying streams, and obtain storage decrees permitting it to refill these reservoirs from the surface streams to the capacity created by the initial pumping. The special water judge dismissed all applications within class I on two grounds. First, the judge stated that the methods proposed by the claimant were infeasible and would necessarily affect the surface stream flow and existing decreed appropriations.[44] Second, the judge found that the representative application requests vast quantities of water for beneficial uses stated in the broadest terms and that, therefore, the claims were merely speculative and made for the purpose of profit.

---

44. One of the supplemental questions that we authorized the special water judge to consider was:

> Can a decree be obtained for a right to store tributary water in an underground reservoir created by the impoundment of water behind a naturally occurring glacial terminal moraine?

In ruling on the class I claims, the special water judge considered only the representative application, oral argument, legal briefs and exhibits, and treated the proceeding as one in the nature of a motion to dismiss or for summary judgment. The trial court declined to consider "Hypothetical Fact Situations and/or Offers of Proof" filed by the class I applicant when members of the trial committee challenged that document with a motion to strike. The court did not hold an evidentiary hearing on the class I representative claim or the other applications in that class to determine whether the method for implementing the proposed storage right was feasible and to determine with more specificity the exact uses for the water. We believe that the approach taken by the trial court was incorrect and unfairly places a burden on the applicant not contemplated by the statutory scheme for adjudication of rights to tributary ground water.

Section 37-92-302 of the 1969 Act sets forth the procedure for applying for a determination of rights to tributary water and requires the inclusion of certain information in standard application forms. Subsection (2) of section 37-92-302 states that the application shall contain "a legal description of the diversion or proposed diversion, a description of the source of the water, the date of the initiation of the appropriation or proposed appropriation, the amount of water claimed, and the use or proposed use of water." Our review of the class I representative application shows that it contains all the basic information required by statute. Dismissal of the class I claims based on the general information contained in the representative application and oral argument by the claimant penalizes it for following statutory application proce-

dures. The record before us does not contain sufficient information to support the trial court's ruling that the class I claims are infeasible and speculative. *See, e.g., Hatfield v. Barnes,* 115 Colo. 30, 168 P.2d 552 (1946) (motion for summary judgment should be denied if a genuine issue of fact is apparent); *cf. Bunger v. Uncompahgre Valley Water Users Ass'n, supra* (based on reference to depositions, the facts supporting dismissal of the claims as speculative on motion for summary judgment were "clear and undisputed"). We reverse the trial court's dismissal of these claims and remand them to the appropriate water divisions for further proceedings.

IV. MISCELLANEOUS RULINGS

A. *Dust Control and Land Reclamation as Beneficial Uses*

[9] The class VII claimants, asserting rights to withdraw both tributary and nontributary ground water, challenge the ruling of the special water judge concerning their applications that neither dust control nor land reclamation is a beneficial use. The judge based his conclusion on the fact that no Colorado cases have involved an appropriation of water for these purposes and that, therefore, such beneficial uses have never been approved. We disagree with the judge's conclusion that dust control and land reclamation are not beneficial uses as a matter of law and reverse this aspect of the trial court's decision.

With respect to the applicants' claims for tributary water, the cases and statutes implementing the constitutional right to appropriate such water supply the frame-

work for determining which uses are "beneficial." The Colorado Constitution specifically recognizes three types of beneficial uses that will support an appropriation of tributary water: domestic, agricultural and manufacturing. *Colo. Const.* Art. XVI, § 6. However, our cases have held that appropriations of tributary water are not limited to those examples given in the constitution. In *City and County of Denver v. Sheriff,* 105 Colo. 193, 96 P.2d 836 (1939), we stated:

> The term "beneficial use" is not defined in the Constitution. What is beneficial use, after all, is a question of fact and depends upon the circumstances in each case.

105 Colo. at 204, 96 P.2d at 842. Thus, we have recognized municipal use, which includes a variety of uses incident to governmental activities, as a beneficial use. *City of Westminster v. Church,* 167 Colo. 1, 445 P.2d 52 (1968). Consistent with this flexible approach taken in the case law, section 37-92-103(4) of the 1969 Act provides the following expansive definition of beneficial use for implementation of the constitutional right to appropriate waters of the state:

> "Beneficial use" is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife. For the benefit and enjoyment of present and future generations, "beneficial use" shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree.

In addition, the general assembly has recognized the beneficial nature of both land reclamation and dust control in other statutory enactments. Those engaged in mining are required by various statutes to reclaim land adversely affected by such activity. *See* Colorado Mined Land Reclamation Act, sections 34-32-101 to -125, C.R.S. 1973 (1982 Supp.); Colorado Surface Coal Mining Reclamation Act, sections 34-33-101 to -137, C.R.S.1973 (1982 Supp.);[45] *see also* Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 to 1328 (Supp. I 1977 and Supp. V 1981). Similarly, the prevention of air pollution by dust (or "particulate matter") has been provided for in the Colorado Air Quality Control Act, sections 25-7-101 to -305, C.R.S.1973 (1982 Repl. Vol. 11); *see CF & I Steel Corp. v. Colorado Air Pollution Control Commission*, 199 Colo. 270, 610 P.2d 85 (1980). Moreover, section 34-29-107, C.R.S.1973 requires a coal mine owner to utilize "water, water with a wetting agent added to it, or some other effective method" to allay excessive coal dust, as a safety measure. *See also* 30 U.S.C. § 842 (1976 & Supp. IV 1980). In light of the flexible approach taken in the case law toward application of the "beneficial use" concept, and given the legislative expressions of concern for reclamation of mined land and abatement of dust pollution, we believe that land reclamation and dust control are beneficial uses.

---

45. *But see section* 34-33-136. Our citation of these reclamation acts is only for the purpose of demonstrating the bases of our conclusion that land reclamation is a "beneficial use." The statutory mandate to reclaim land affected by mining does not supply authority for persons seeking water rights for this purpose to affect adversely the vested water rights of others.

With respect to the applicants' claims for nontributary water, our conclusion is the same. The 1965 Act expressly requires that the applicant for nontributary water rights, whether within or without a designated basin, must state the "beneficial use" to which the water will be applied. Sections 37-90-107, -108, and -137. While the 1965 Act does not provide a definition of beneficial use, *see* section 37-90-103, the general assembly incorporated that term into the Act aware that it had a well-established place in the legal terminology relative to tributary water rights. Although the legislature was at liberty to adopt different restrictions on the use of nontributary ground water, it chose instead to apply the same concept of beneficial use to such waters. Accordingly, we hold that land reclamation and dust control are proper beneficial uses for appropriations of tributary and nontributary water.

B. *Federal Reserved Rights*

[10] The United States appeals that portion of the trial court's decision stating that the federal government has no rights to water underlying lands reserved to it from the public domain. This ruling of the special water judge is not binding because the issue of federal reserved water rights was not before the trial court. We have since addressed the question of the nature and extent of federal reserved rights in *United States v. City and County of Denver, supra.* In that case, contrary to the opinion of the special water judge, we recognized the existence of federal reserved rights in certain circumstances and explained their nature and incidents. We therefore disapprove of the opinion expressed by the special water judge on this issue.

V. CONCLUSION AND DISPOSITION

The judgment of the trial court is affirmed in part and reversed in part. We affirm that part of the trial court judgment dismissing certain applications for nontributary ground water but do so on the ground that the water court does not have jurisdiction over such applications. Accordingly, all such applications must be dismissed. Dismissal of these claims is without prejudice, and the claimants may file applications for well permits with the state engineer under section 37-90-137 and have leave to amend the applications to request water court determination of whether the water sought is nontributary, as claimed. Any desired appeals from a state engineer's decision taken prior to the time governed by the 1983 Revision must be made under the procedures set forth in sections 37-90-115 and 24-4-106.

The judgment of the trial court is affirmed to the extent that it ordered remand of the tributary water applications for further proceedings and reversed to the extent that it dismissed such claims. All applications for tributary ground water were properly filed in water court, and they are remanded for further proceedings in the respective water divisions. The water courts continue to have jurisdiction over such claims even if well permit applications with the state engineer under section 37-90-137 have not been finally acted upon.

That part of the trial court's judgment holding that dust control and land reclamation are not beneficial uses as a matter of law is reversed. Finally, we disapprove the trial court's expressions with regard to federal reserved water rights.

The cases are remanded to the respective water divisions in which they were filed for further proceedings consistent with the views expressed in this opinion.

ON PETITIONS FOR REHEARING:

Certain parties have requested rehearing to argue the effect of legislation passed by the General Assembly subsequent to the issuance of our opinion in this case. We decline those requests but, on remand, direct the water judges to consider the applicability, validity and effect of those legislative enactments and their impact on our previous determination that the applications for nontributary ground water should be dismissed.

After the announcement of our opinion and while petitions for rehearing were pending, the Colorado legislature passed Senate Bill No. 439, and the Governor signed the new legislation on October 11, 1983. That act provides:

> CONCERNING THE ADJUDICATION OF NONTRIBUTARY GROUND WATER OUTSIDE OF DESIGNATED GROUND WATER BASINS.
>
> *Be it enacted by the General Assembly of the State of Colorado:*
>
> SECTION 1. 37-92-203(1), Colorado Revised Statutes, is amended to read:
>
> 37-92-203. *Water judges — jurisdiction.* (1) There is established in each water division the position of water judge of the district courts of all counties situated entirely or partly within the division. Said district courts collectively acting through the water judge have exclusive jurisdiction of water matters within the division, and no judge other than the one designated as a water judge shall act with respect to water matters in that division. Water mat-

ters shall include only those matters which this article and any other law shall specify to be heard by the water judge of the district courts. WATER MATTERS INCLUDE DETERMINATIONS OF RIGHTS TO NONTRIBUTARY GROUND WATER OUTSIDE OF DESIGNATED GROUND WATER BASINS. JUDGMENTS AND DECREES ENTERED PRIOR TO THE EFFECTIVE DATE OF THIS SUBSESTION (1), AS AMENDED, IN ACCORDANCE WITH THE PROCEDURES OF SECTIONS 37-92-302 TO 37-92-305 WITH RESPECT TO SUCH GROUND WATER SHALL BE GIVEN FULL EFFECT AND ENFORCED ACCORDING TO THE TERMS OF SUCH DECREES.[1]

SECTION 2. 37-90-137, Colorado Revised Statutes, as amended by House Bill No. 1440, enacted at the First Regular Session of the Fifty-fourth General Assembly and approved by the Governor on May 23, 1983, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

37-90-137. *Permits to construct wells outside designated areas—fees—permit no ground water right—evidence—time limitation.* (6) Rights to nontributary ground water outside of designated ground water basins may be determined in accordance with the procedures of sections 37-92-302 to 37-92-305. Such proceedings may be commenced at any time and may include a determination of the right to such water for existing and future uses. Such determination shall be in accordance with subsections (4) and (5) of this section. Claims pending as of the effective date of this act which have been published pursuant to section 37-92-302 in the resume need not be republished.

SECTION 3. *Safety clause.* The general assembly hereby finds, determines, and declares that this

---

1. Capital letters indicate new material added to existing statutes.

act is necessary for the immediate preservation of the public peace, health, and safety.

Shortly after passage of Senate Bill No. 439, the two houses of the General Assembly adopted the following joint resolution:

> *Be It Resolved by the House of Representatives of the Fifty-fourth General Assembly of the State of Colorado, the Senate concurring herein:*
>
> That the General Assembly hereby finds and declares that its intention in enacting Senate Bill No. 439, enacted at the First Regular Session of the Fifty-fourth General Assembly, was that its provisions were procedural only, and that the provisions of section 37-90-137(4), Colorado Revised Statutes, shall continue to control the granting of permits for nontributary ground water outside of designated ground water basins.

House Joint Resolution No. 1038 (1983).

We took notice of these new developments on motions of some of the parties to this proceeding. In petitions filed after Senate Bill No. 439 was adopted, the parties have taken various positions concerning the validity and effect of the new legislation and have requested that we permit briefing and argument on the issues. We believe, however, that these questions will be better postured for appellate resolution after trial courts have been given an opportunity to consider them as they apply to particular cases. Therefore, we elect to deny the petitions for rehearing to the extent that they are based on the new legislation.

In response to other matters raised in the petitions for rehearing, we have modified our opinion, and it will appear in the official reporter as modified. Except for the changes reflected in this opinion on petitions for

rehearing and in the modifications, the petitions for rehearing are denied.

We also modify our judgment and directions to the water courts by reversing that part of the trial court judgment dismissing the applications for nontributary ground water, remanding those applications to the respective water divisions, and diecting the water judges to consider whether those applications should be dismissed, or retained for further proceedings, in light of the legal principles set forth in our opinion and of Senate Bill No. 439 and House Joint Resolution No. 1038.

APPENDIX C

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION
AMENDMENT XIV, SECTION I

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CONSTITUTION
ARTICLE 1, SECTION 10

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but

gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainer, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ACT OF 1866, CHAPTER 262, SECTION 9

And be it further enacted, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested right shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however,* That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure

or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

DESERT LAND ACT OF 1877, CHAPTER 107

An act to provide for the sale of desert lands in certain States and Territories

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, *Provided however* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land

if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. *Provided,* that no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form.

SECTION 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated—

SECTION 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.

Office - Supreme Court, U.S.
FILED
MAR 23 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1310

In The

Supreme Court of the United States

October Term, 1983

EDWARD T. YOUNG, JR., et al.,
Petitioners,

v.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DUANE WOODARD
Attorney General
WILLIAM A. PADDOCK
Counsel of Record
First Assistant Attorney General
Natural Resources Section
PAULA C. PHILLIPS
Assistant Attorney General
Natural Resources Section
Attorneys for Respondents
State of Colorado, Department of Natural Resources, Division of Water Resources, State Engineer
1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 866-3611

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

	Pages
TABLE OF AUTHORITIES	ii
CONSTITUTIONAL AND STATUORY PROVISIONS	v
SUMMARY OF ARGUMENT	1
ARGUMENT:	
I. AN ALLEGED CHANGE IN THE COMMON LAW RULES GOVERNING THE USE AND ALLOCATION OF UNDERGROUND WATER WITHIN THE STATE DOES NOT WORK AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY RIGHTS.	3
II. ADOPTING PETITIONERS' VIEW WOULD UPSET LONG SETTLED LEGAL EXPECTATIONS ESTABLISHED BY THE PRIOR DECISIONS OF THIS COURT AND BY COLORADO LAW.	6
A. State law controls the definition and delineation of property rights such as those asserted here.	6
B. Colorado has never recognized the property interests petitioners assert as an incident of ownership of the overlying land.	10
III. THE CONTRACT CLAUSE DOES NOT APPLY TO JUDICIAL DECISIONS.	15
IV. NO WATER RIGHTS OF THE FEDERAL GOVERNMENT WERE IMPAIRED BY THE HUSTON DECISION.	15
CONCLUSION	17
APPENDIX	App. 1

TABLE OF AUTHORITIES

CASES CITED

Pages

Andrus v. Charlestone Stone Products Co., 436 U.S. 604 (1978) 8, 9, 16

Baeth v. Hoisveen, 157 N.W.2d 728 (N.D. 1968) 4

Baker v. Ore-Ida Foods, 95 Idaho 575, 513 P.2d 627 (1973) 4

Barrows v. Jackson, 346 U.S. 249 (1953) 15

Baumann v. Smrha, 145 F. Supp. 617 (D. Kan.), aff'd, 352 U.S. 863 (1956) 5

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 4, 7, 16

California v. United States, 438 U.S. 645 (1978) 7, 8, 16

Comstock v. Ramsay, 55 Colo. 244, 133 P. 1107 (1913) 11, 15

District 10 Water Users Association v. Barnett, 198 Colo. 291, 599 P.2d 894 (1979) 3, 14

Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902) 6

Federal Power Commission v. Oregon, 349 U.S. 435 (1955) 16

Great Northern Railroad v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) 5

Hicks v. Miranda, 422 U.S. 332 (1975) 5

Hinton v. Little, 50 Idaho 371, 296 P. 582 (1931) 4

Hughes v. Washington, 389 U.S. 290 (1967) 3

Ickes v. Fox, 300 U.S. 82 (1937) 8

Kansas v. Colorado, 206 U.S. 46 (1907) 7, 8

Knight v. Grimes, 80 S.D. 517, 127 N.W.2d 708 (1964) 4

Kuiper v. Lundvall, 187 Colo. 40, 529 P.2d 1328 (1974), cert. denied, 421 U.S. 996 (1975) 3, 14

TABLE OF AUTHORITIES — Continued

Pages

McClellan v. Hurdle, 3 Colo. App. 430, 33 P. 280 (1893) ——— 11

Metromedia v. City of San Diego, 453 U.S. 490 (1981) ——— 5

Nevius v. Smith, 86 Colo. 178, 279 P. 44 (1929) ——— 11

Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) ——— 6, 7, 10

Packer v. Bird, 137 U.S. 661 (1891) ——— 10

Safranek v. Town of Limon, 123 Colo. 330, 228 P.2d 975 (1951) ——— 3, 12, 13

Sporhase v. Nebraska, 458 U.S. 941 (1982) ——— 5

State ex rel. Bliss v. Dority, 55 N.M. 12, 225 P.2d 1007 (1950), appeal dismissed, 341 U.S. 924 (1951) 4

State ex rel. Danielson v. Vickroy, 627 P.2d 752 (Colo. 1981) ——— 3, 14

State v. Michels Pipeline Construction, 63 Wis. 2d 278, 217 N.W.2d 339 (1974) ——— 11

State v. Southwestern Colorado Water Conservancy District, 671 P.2d 1294 (Colo. 1983) ——— 1, 3, 5, 7, 8, 15, 16, 17

Sunray Oil Co. v. Commissioner, 147 F.2d 962 (10th Cir. 1945) ——— 5

Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924) ——— 5, 6, 15

Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 638 P.2d 1324 (1981), appeal dismissed, 457 U.S. 1101 (1982) ——— 4

United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982) ——— 8, 16

United States v. New Mexico, 438 U.S. 696 (1978) ——— 16

TABLE OF AUTHORITIES — Continued

Pages

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) ——— 4

Whitten v. Coit, 153 Colo. 157, 385 P.2d 131 (1963) ——— 11, 13, 14

Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839) ——— 7

Williams v. City of Wichita, 190 Kan. 317, 374 P.2d 578 (1962), appeal dismissed, 375 U.S. 7 (1963) ——— 4

CONSTITUTION AND STATUTES

U.S. Const. art. I, sec. 10 ——— 15

Act of July 26, 1866, ch. 262, sec. 9, 14 Stat. 251, 253 (codified at 30 U.S.C. § 51 (1976)) ——— 8

Act of July 9, 1870, ch. 235, sec. 17, 16 Stat. 217, 218 (codified at 30 U.S.C. § 52 (1976)) ——— 8

Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§ 321-29 (1976)) ——— 8, 16

Colo. Rev. Stat. 37-82-101(1) (Supp. 1983) ——— 15

Colo. Rev. Stat. 37-90-101 et seq. (1973) ——— 14

Colo. Rev. Stat. 37-90-103(6) (1973) ——— 14

Colo. Rev. Stat. 37-90-137(1) (1973) ——— 14

Colo. Rev. Stat. 37-90-137(4) (1973) ——— 14

Colo. Rev. Stat. 37-92-103(11) (1973) ——— 14

OTHER AUTHORITIES

Note, Colorado Water Law, 47 Den. L. J. 226 (1970) ——— 14

S. Rep. No. 755, 82d Cong., 1st Sess. 3 (1951) ——— 8

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this case are cited in the Table of Authorities. The text of Colorado statutes is printed in the Appendix. Other cited statutory authorities are reproduced in the petition.

No. 83-1310

In The

Supreme Court of the United States

October Term, 1983

EDWARD T. YOUNG, JR., et al.,
Petitioners,

v.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF THE ARGUMENT

Petitioners assert that private landowners acquiring land by patent from the federal government also acquired a common law ownership right in ground water lying beneath the land. They contend that the State of Colorado has always recognized the absolute ownership of nontributary ground water by the overlying landowner, and that the Colorado Supreme Court's decision in *State v. Southwestern Colorado Water Conservancy District*, 671 P.2d 1294 (Colo. 1983) (hereinafter referred to as *Huston*), effected an unpredictable change in state law, resulting in an unconstitutional taking without just compensation of petitioners' property rights. Petitioners also allege the decision impaired contracts that, though not in the record, are "presumed" to exist and to have been relied upon.

Finally, they claim that the court's opinion has taken from the United States government the nontributary water underlying its land has deprived it of the power to own or convey that water to a patentee. None of these assertions can survive scrutiny, and none merits review.

Numerous decisions of this Court have held that a state may change common law rules with respect to use and control of underground water, and such a change does not effect a taking of private property without just compensation. Because this issue has been foreclosed by the Court's prior decisions, no substantial federal question is presented.

This Court has long held that state law defines the property rights of landowners in relation to the state or other private parties. This rule is particularly applicable to water rights, which the Court has repeatedly held are governed by state and local laws and customs. In reliance on these decisions, the western states have developed their own systems for the use and allocation of water. Reconsideration of this deferential approach would upset the water rights systems of the western states and the populations and economies developed in reliance thereon.

The decision of the Colorado Supreme Court does not violate the contract clause of the United States Constitution. That clause applies only to legislation.

No reserved water rights of the United States were impaired by this decision. The supreme court recognized the existence of such rights and expressly disapproved the contrary opinion of the special water judge.

———o———

ARGUMENT

I.

An Alleged Change in the Common Law Rules Governing the Use and Allocation of Underground Water Within the State Does Not Work an Unconstitutional Taking of Private Property Rights.

Petitioners' taking argument is based upon two premises: (1) that the common law rule of absolute ownership of ground water as an incident of surface ownership prevailed in Colorado prior to *Huston;* and (2) that the *Huston* decision represented such a sudden and unexpected change in property law, it raises the kind of constitutional just compensation issue suggested in Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 294-98 (1967).[1]

Colorado has never recognized a common law ownership right in nontributory[2] ground water. *See* part II.B,

---

1. Petitioners, in an effort to create a conflict sufficient to support discretionary review, sweepingly assert that *Huston* is contrary to this Court's holding in *Hughes*. Petition at 9. Their argument demonstrates, however, that it is solely the concurring opinion and *not* the ruling in *Hughes* — that federal common law determines title to oceanfront accretions — upon which they rely. Petition at 5-9.

2. Under Colorado law ground water is classified as being tributary, nontributary, or designated ground water (within a designated ground water basin). Ground water the withdrawal of which will not influence the rate or direction of flow of a natural surface stream within 100 years is considered to be nontributary. *District 10 Water Users Association v. Barnett*, 198 Colo. 291, 599 P.2d 894 (1979); *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), *cert. denied*, 421 U.S. 996 (1975); *see State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981); *Safranek v. Town of Limon*, 123 Colo. 330, 228 P.2d 975 (1951).

infra. Even assuming *arguendo* that it had, the power of the state to replace rules of common law with statutory or decisional doctrines better suited to changing conditions and the public interest cannot at this late date be denied. As this Court stated in *United States v. Rio Grande Dam & Irrigaion Co.*, 174 U.S. 690, 702-03 (1899):

> While . . . [the riparian doctrine with respect to surface waters] obtains in those states in the Union which have simply adopted the common law, . . . as to every stream within its dominion a state may change this common-law rule and permit the appropriation of the flowing waters for such purposes as it deems wise.

Accord, e.g., California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

Numerous other states have rejected the common law ownership theory of ground water. *E.g., Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981) (also rejecting claim of a taking without just compensation), *appeal dismissed*, 457 U.S. 1101 (1982) (no substantial federal question); *Baker v. Ore-Ida Foods*, 95 Idaho 575, 513 P.2d 627 (1973); *Hinton v. Little*, 50 Idaho 371, 296 P. 582 (1931); *Williams v. City of Wichita*, 190 Kan. 317, 374 P.2d 578 (1962) (also rejecting just compensation claim), *appeal dismissed*, 375 U.S. 7 (1963) (no substantial federal question); *State ex rel. Bliss v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950) (also rejecting just compensation claim, and holding federal patents conveyed no interest in ground water), *appeal dismissed*, 341 U.S. 924 (1951) (no substantial federal question, citing *Beaver Portland Cement Co., supra*); *Baeth v. Hoisveen*, 157 N. W.2d 728 (N.D. 1968) (also rejecting just compensation claim); *Knight v. Grimes*, 80 S.D. 517, 127 N.W.2d 708 (1964) (same, and holding federal patents conveyed no

rights in water). *See also Baumann v. Smrha*, 145 F. Supp. 617 (D. Kan.), *aff'd*, 352 U.S. 863 (1956). This Court's summary affirmances and dismissals for want of a substantial federal question are binding on lower courts as decisions on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). The Court in these decisions has consistently and repeatedly indicated its agreement with the result reached by the *Huston* court. *Sporhase v. Nebraska*, 458 U.S. 941, 949 (1982); *Metromedia v. City of San Diego*, 453 U.S. 490, 499 (1981).

Even if the *Huston* decision had reversed established precidential authority, "the mere fact that the state court reversed a former decision, to the prejudice of one party, does not take away his property without due process of law." *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924). *See Great Northern Railroad v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-65 (1932). This rule has been expressly applied in a challenge to state statutory provisions abrogating the common law ownership rule of ground water. *Baumann v. Smrha*, 145 F. Supp. 617 (D. Kan.), *aff'd*, 352 U.S. 863 (1956). There, the common law doctrine had been enunciated in numerous opinions of the Kansas Supreme Court. Noting that the latest state supreme court decision on the issue "must be regarded as having overruled the earlier cases," the three-judge panel held, *inter alia*:

> There is no vested right in the decisions of a court and a change of decision does not deprive one of . . . property without due process of law.
>
> Even though prior decisions of a state court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property . . . .

145 F. Supp. at 625 (footnotes omitted). *Accord Sunray Oil Co. v. Commissioner*, 147 F.2d 962 (10th Cir. 1945).

Cf. Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (overruling prior Supreme Court decision on property rights).

Petitioners have cited no authority suggesting, contrary to the foregoing decisions of this Court, that abrogation of the common law private ownership doctrine raises a constitutional just compensation issue, or any other substantial federal question. Since the issues asserted by petitioners have "been so explicitly decided by this court as to foreclose further argument on the subject . . . the Federal question relied upon [is] devoid of any substantial foundation or merit." *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 314 (1902). *Accord Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455-56 (1924).

II.

Adopting Petitioners' View Would Upset Long Settled Legal Expectations Established By the Prior Decisions of This Court and By Colorado Law.

A. State law controls the definition and delineation of property rights such as those asserted here.

It is well established that

> [u]nder our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. "The great body of law in this country which controls acquisition, transmission, and transfer of property, and *defines the rights of its owners in relation to the state or to private parties*, is found in the statutes and decisions of the state." *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944).

Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977) (emphasis added). The *Corvallis* Court reaffirmed the following language from *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 517 (1839):

> We hold the true principle to be this, that whenever the question in any court, State or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to State legislation . . . .

429 U.S. at 377.

Perhaps nowhere is the federal deference to state law on the definition of property rights more clearly present than in matters involving water rights in the western states. For more than a century both Congress and this Court have consistently recognized and deferred to the authority of the western states to create, define, regulate, and control rights and interests in the appropriation, distribution, and use of waters within their borders. *E.g., California v. United States*, 438 U.S. 645, 653-63 (1978); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 395 U.S. at 165. *See also Kansas v. Colorado*, 206 U.S. 46, 93 (1907) ("It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including beds of streams and other waters."). The plenary power of the states to adopt their own systems for the acquisition, use, and distribution of waters in accordance with the public interest is subject only "to the prohibitions against interference with federal reserved rights, with interstate commerce, and with the navigability of any navigable waters." *Huston*, 671 P.2d at 1307.

Petitioners argue that there is another exception to the state's authority. They contend that federal patentees obtained, by common law, ownership rights in the nontributary ground water[3] beneath the land conveyed, and that those rights could not subsequently be impaired without payment of compensation.

The Colorado Supreme Court, consistent with this Court's decisions, looked to federal law on the question whether nontributary ground water was severed from the realty when the latter was patented to private parties. *Huston*, 671 P.2d at 1304-07. *See also United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982). The court's opinion ably and thoroughly discusses the federal legislative and judicial authorities[4] which have long established that "the water *above and beneath the surface* of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof." S. Rep. No. 775, 82d Cong., 1st Sess. 3 (1951) (emphasis added) (report on the McCarran Amendment, codified at 43 U.S.C. §666 (1976), and quoted with approval in *California v. United States*, 438 U.S. at 678, as "[p]erhaps the

---

3. The common law did not recognize "nontributary" as a ground water classification. See note 5, *infra* p. 11.

4. *E.g.*, Act of July 26, 1866, ch. 262, sec. 9, 14 Stat. 251, 253 (codified at 30 U.S.C. §51 (1976)); Act of July 9, 1870, ch. 235, sec. 17, 16 Stat. 217, 218 (codified at 30 U.S.C. §52 (1976)); Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§321-29 (1976)); *California v. United States*, 438 U.S. 645, 653 (1978); *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 614 (1978); *Ickes v. Fox*, 300 U.S. 82 (1937); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *Kansas v. Colorado*, 206 U.S. 46, 93 (1907).

most eloquent expression of the need to observe state water law . . .").

The policies that this Court has recognized as the foundation for federal deference to state control of water rights are as applicable to ground water as to surface water. Significantly, in *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978), this Court refused to draw an arbitrary distinction between the policies and rules governing acquisition of surface water rights and those governing ground water. There, the Court decided the issue "[w]hether water is a locatable mineral under the Mining Law of 1872." *Id.* at 610. The specific water involved was underground water. *Id.* at 606. Citing provisions in the Mining Law of 1872 involving water rights and the decisions of this Court construing those and earlier statutory provisions, the *Charlestone Stone Products* Court held:

> Congress . . . expressly provided a water rights policy in the mining laws. But the policy adopted is a "passive one, . . . ; Congress three times (in 1866, 1870 and 1872) affirmed the view that private water rights on federal lands were to be governed by state and local law and custom. It defies common sense to assume that Congress, when it adopted this policy, meant at the same time to establish a parallel federal system for acquiring private water rights . . . .

436 U.S. at 614. Particularly relevant is the *Charlestone Stone Products* opinion's discussion of policy considerations weighing against a conclusion that ground water could be claimed under the mining laws.

> Many problems would undoubtedly arise simply from the fact of having two overlapping systems for acquisition of private water rights . . . .
>
> • • •
>
> . . . A federal claimant could, for example, utilize all of the water extracted from a well like respond-

> ent's, without regard for the settled prior appropriation rights of another user of the same water. Or he might not use the water at all and yet prevent another from using it, thereby defeating the necessary Western policy in favor of "actual use" of scarce water resources. [Citation omitted.] As one respected commentator has written, allowing water to be the basis of a valid mining claim "could revive *long-abandoned common law rules of ground water ownership and capture, and . . . could raise horrendous problems of priority and extralateral rights.*" We decline to effect so major an alteration in established legal relationships based on nothing more than an overly literal reading of a statute, without any regard for its context or history.

436 U.S. at 615-16 (emphasis added) (footnotes omitted). In precisely the same manner, approval of petitioners' theory of ownership of nontributary ground water, based upon "an overly literal reading" of nineteenth century statutes, would work a "major . . . alteration in established legal relationships," in derrogation of the state's recognized authority to control the use and distribution of water within its borders.

B. Colorado has never recognized the property interests petitioners assert as an incident of ownership of the overlying land.

It is within the authority of the state to determine "whatever incidents or rights attach to the ownership of property conveyed by the government." *Packer v. Bird*, 137 U.S. 661, 669 (1891), quoted with approval in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. at 380. The State of Colorado, like virtually all western states, has exercised its prerogative to adopt the rules it deems in the best interest of its citizens to govern the ownership, use, and/or acquisition of rights to nontributary ground water.

Petitioners base their argument that Colorado recognized ground water ownership in overlying landowners on statements in *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963). The passage upon which they rely is dictum, unsupported by any other Colorado decisional or legislative authority.

As early as 1893, the Colorado Court of Appeals suggested that Colorado courts would reject the common law classifications of ground water.[5] *McClellan v. Hurdle*, 3 Colo. App. 430, 434, 33 P. 280, 282 (1893). *Comstock v. Ramsay*, 55 Colo. 244, 133 P. 1107 (1913), held that when seepage or percolating water is tributary to a stream, it is a part thereof and subject to the constitutional doctrine of prior appropriation. *Id.* at 255-56, 133 P. at 1111. Subsequently, in *Nevius v. Smith*, 86 Colo. 178, 279 P. 44 (1929), the supreme court flatly rejected the common law distinction between "underground streams" and "percolating groundwater":

> The argument of the defendants, based on decisions from other states, that percolations belong to the owner of the soil, is unsound in Colorado. Ever since *Comstock v. Ramsay*, . . . we have held that seepage and percolation belong to the river . . . .

These cases refute any claim that percolation or seepage of any water belongs to the landowner, and fix

---

5. The common law distinguished between "underground streams" and "percolating ground water." In both riparian and appropriative jurisdictions, the same rules applicable to surface streams generally applied to underground streams. Percolating ground water, on the other hand, was generally governed at common law by one of three rules: the English rule of absolute ownership; the American rule of reasonable use; or the doctrine of correlative rights. *See generally State v. Michels Pipeline Construction*, 63 Wis. 2d 278, 217 N.W.2d 339 (1974).

> the principle that any appropriation of it must be subject to all prior appropriations from the river . . . .

86 Colo. at 181-82, 279 P. at 45. Since the court, however, confined its decision to such waters as "belong to the stream," *id.* at 183, 279 P. at 46, the law that would apply to nontributary ground water was left undecided.

In *Safranek v. Town of Limon*, 123 Colo. 330, 228 P.2d 975 (1951), the court addressed the law of nontributary ground water. There the appellant landowner asserted: "In this State percolating sub-surface waters, not tributary to any stream, are the property of the owner of the land, as at common law." *Id.* at 334, 228 P.2d at 977. After a survey of its prior decisions, the court stated:

> Had it been established by the record in this case that the water diverted by the town was nontributary ground water, such as an underground lake, the waters of which are not a part or a source of a natural stream, still the above-quoted statement upon which counsel for tht respondents base their claim of ownership of the water would *not be a correct statement of Colorado law. We have long since departed from the English common-law doctrine of ownership of percolating waters by the surface owner, Nevius v. Smith, supra,* and we would, in such case, be confronted with the question upon which there is an absence of statutory law in Colorado as well as direct decision by our courts. Whether in such case we should follow the California doctrine of reciprocal rights, developed from its law of riparian rights, or whether we should extend one step further our Colorado doctrine of first in time, first in right, need not now be determined.

Id. at 335-36, 228 P.2d at 978 (emphasis added). *Safranek* thus recognized that the very ownership theory upon which petitioners' arguments here are predicated had long since been rejected. It left open only the question of what doc-

trine *other than ownership* it might apply when called upon to rule in an appropriate case.

In *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963), the Colorado Supreme Court directly addressed the question whether nontributary ground water was subject to appropriation under the Colorado constitution and surface water management statutes. There the court succinctly stated the "controlling question" presented: "whether the doctrine of prior appropriation of water to beneficial use is applicable to underground waters which are not tributary to any natural stream, and so results in a priority of right to the water thus used." *Id.* at 163, 385 P.2d at 134-35. Based on the Colorado Constitution and the controlling state statutes, the court answered that question in the negative. Instead, it found that the general assembly contemplated "an equitable and efficient use of nontributary underground water not pursuant to any theory of appropriation." *Id.* at 169, 385 P.2d at 138 (emphasis deleted).

In clear dictum, the *Whitten* court addressed the question that the *Safranek* court had expressly declined to decide. It "approve[d] the language" of a law review article stating in pertinent part:

> It is submitted that the basis [for administering nontributary ground water] should not be, and is not, based on priority of diversion. The land owner has property in the water in his soil. It is a vested right which cannot be taken away by mere legislation. It is subject only to the reasonable use doctrine. If the ground water is in motion so as to be tributary to a natural stream, or part of the stream water table, it has always been subject to priorities of appropriation on the natural stream. But unless it is tributary to the natural stream, it is not subject to the law of appropriation.

153 Colo. at 173-74, 385 P.2d at 140. No question of *ownership* of nontributary ground water was relevant or necessary to the court's decision. Moreover, the law review article cited by the court has subsequently been shown to have been without foundation in Colorado law. Note, *Colorado Water Law*, 47 Den. L. J. 226, 312-16 (1970).

The Colorado General Assembly quickly rejected any notion that *Whitten* might have created of a common law ownership right in the overlying landowner. In the Ground Water Management Act of 1965, Colo. Rev. Stat. 37-90-101 *et seq.* (1973), it applied a modified doctrine of prior appropriation to "designated ground water," which includes nontributary ground water, an action clearly inconsistent with the argument of petitioners. Colo. Rev. Stat. 37-90-103(6) (1973); *State ex rel. Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981). *See also* Colo. Rev. Stat. 37-92-103(11) (1973); *District 10 Water Users Association v. Barnett*, 198 Colo. 291, 599 P.2d 894 (1979); *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), *cert. denied*, 421 U.S. 996 (1975).

Outside the boundaries of designated ground water basins, the 1965 Act provided that no new wells could be constructed, nor the supply of water from an existing well enlarged, unless the user applied to the state engineer for a "permit to construct a well." Colo. Rev. Stat. 37-90-137(1) (1973). In 1973 the general assembly amended the Ground Water Management Act to more carefully control the use of nontributary ground water. Colo. Rev. Stat. 37-90-137(4) (1973). The amendment provided protection for existing users of such water outside the boundaries of designated ground water basins while limiting the class of persons entitled to use such water and the rate at which the

resource could be consumed. *See also* Colo. Rev. Stat. 37-82-101(1) (Supp. 1983) (enacted in 1979).

As the foregoing authorities demonstrate, the common law ownership theory petitioners advance has never been legislatively or judicially recognized in Colorado and the decisions of Colorado appellate courts have so indicated since at least *Comstock v. Ramsay* in 1913. For this Court to embark on a different course at this late date would upset not only the state procedures for the allocation of water, but also the many water rights established and used under the authority of state law. Such a result is wholly unwarranted.

III.

The Contract Clause Does Not Apply to Judicial Decisions.

Petitoners claim that the *Huston* decision violates the contract clause. U.S. Const. art. I, sec. 10. "The short answer to this contention is that this provision, as its terms indicate, is directed against legislative action only." *Barrows v. Jackson*, 346 U.S. 249, 260 (1953). *Accord Tidal Oil Co. v. Flanagan*, 263 U.S. at 451-54.

IV.

No Water Rights of the Federal Government Were Impaired By the Huston Decision.

Petitioners contend that in the *Huston* decision "the Colorado Supreme Court has seized the nontributary ground water underlying land of the United States and deprived the United States Government of the power to own or to convey that water to a patentee." Petition at 15. This assertion is wholly without merit.

As to lands remaining within the public domain, it was settled over a century ago that state law governs the delineation and acquisition of water rights. Desert Land Act, Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§321-29 (1976); *California v. United States*, 438 U.S. 645 (1978); *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978) (ground water); *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *Huston*, 671 P.2d at 1304-07; *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982).

It has also long been recognized that this state authority over water is subject to certain limitations among which is the federal government's "authority to reserve unappropriated water . . . for use on appurtenant lands withdrawn from public domain for specific federal purposes." *United States v. New Mexico*, 438 U.S. 696, 698 (1978). In *Huston*, the special water judge opined[6] "that the federal government has no rights to water underlying lands reserved to it from the public domain." 671 P.2d at 1323. The federal government appealed. The Colorado Supreme Court disposed of the matter in a single paragraph.

> In [*United States v. City and County of Denver*], contrary to the opinion of the special water judge, we recognized the existence of federal reserved rights in certain circumstances and explained their nature and incidents. We therefore disapprove of the opinion expressed by the special water judge on this issue.

---

6. The decision of the special water judge is printed in the appendix to the petition at App. 1-54.

Id. Thus, the *Huston* decision can hardly be said to have "seized" the property of the United States government.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Court deny the petition for certiorari.

FOR THE ATTORNEY GENERAL

WILLIAM A. PADDOCK
First Assistant Attorney General

PAULA C. PHILLIPS
Assistant Attorney General
Natural Resources Section

Members of the Bar
of this Court

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 866-3611

Attorneys for Respondents

APPENDIX

37-82-101 (1) The water of every natural stream, as referred to in sections 5 and 6 of article XVI of the state constitution, includes all the water occurring within the state of Colorado which is in or tributary to a natural surface stream. The waters of natural streams of Colorado do not include underground waters not in or tributary to natural surface streams nor underground waters which, when withdrawn, do not impair the flow of natural surface streams. All waters not in or tributary to a natural stream, as described in this subsection (1), shall be subject to such administration and use as the general assembly may provide by law. Such nontributary waters, when released from the dominion of the user, become a part of the natural surface stream where released, subject to water rights on such stream in the order of their priority.

37-90-103 (6) (not including 1983 amendment) "Designated ground water" means that ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights, or ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principal water usage for at least fifteen years preceding the date of the first hearing on the proposed designation of the basin, and which in both cases is within the geographic boundaries of a designated ground water basin.

37-90-137 (1) From and after May 17, 1965, no new wells shall be constructed outside the boundaries of a designated ground water basin, nor the supply of water from existing wells outside the boundaries of a designated

ground water basin increased or extended, unless the user makes an application in writing to the state engineer for a "permit to construct a well", in a form to be prescribed by the state engineer. The applicant shall specify the particular designated aquifer from which the water is to be diverted, the beneficial use to which it is proposed to apply such water, the location of the proposed well, the name of the owner of the land on which such well will be located, the average annual amount of water applied for in acre-feet per year, the proposed maximum pumping rate in gallons per minute, and, if the proposed use is irrigation, a description of the land to be irrigated and the name of the owner thereof, together with such other reasonable information as the state engineer may designate on the form prescribed.

37-90-137 (4) In the issuance of a permit to construct a well in those aquifers which do not meet the definitions of section 37-90-103 (6) or section 37-92-103 (11), and do not meet the exemptions set forth in section 37-90-105 and 37-92-602, the provisions of subsections (1) and (2) of this section shall apply; except that, in considering whether the permit shall be issued, only that quantity of water underlying the land owned by the applicant or by the owners of the area, by their consent, to be served is considered to be unappropriated; the minimum useful life of the aquifer is one hundred years, assuming that there is no substantial artificial recharge within said period; and no material injury to vested water rights would result from the issuance of said permit. The state engineer may adopt rules and regulations to assist in, but not as a prerequisite to, the granting or denial of permits to construct wells and for the administration of this underground water.

37-92-103 (11) "Underground water" as applied in this article for the purpose of defining the waters of a natural stream, means that water in the unconsolidated alluvial aquifer of sand, gravel, and other sedimentary materials, and all other waters hydraulically connected thereto which can influence the rate or direction of movement of the water in that alluvial aquifer or natural stream. Such "underground water" is considered different from "designated ground water" as defined in section 37-90-103 (6).

Office - Supreme Court, U.S.
FILED
MAR 1 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1310

In The
Supreme Court of the United States
October Term 1983

EDWARD T. YOUNG, JR., WILLOW WATER DISTRICT, SOUTH CHERRY CREEK LAND COMPANY, SMOKEY HILLS LAND COMPANY, EAST CHERRY VALLEY WATER AND SANITATION DISTRICT, ADOLPH COORS COMPANY,

Petitioners,

vs.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, ET AL.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF COLORADO

Counsel of Record:
ROBERT W. JOHNSON
1528 North Tejon Street
Colorado Springs, Colorado 80907
Telephone: (303) 635-5181

Counsel in Colorado Supreme Court:
M. E. MACDOUGALL
GEDDES, MACDOUGALL, GEDDES & PAXTON, P.C.
530 South Nevada Avenue
Colorado Springs, Colorado 80903
Telephone: (303) 475-7090

February 24, 1984

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

Page

Brief in Support of Petition for a Writ of Certiorari 1

TABLE OF AUTHORITIES

Table of Cases

State of Colorado v. Southwestern Colorado Water Conservation District, 671 P.2d 1294 (Colo. Sup. Ct., 1983) ——— 2

No. 83-1310

In The

Supreme Court of the United States

October Term 1983

EDWARD T. YOUNG, JR., WILLOW WATER DISTRICT, SOUTH CHERRY CREEK LAND COMPANY, SMOKEY HILLS LAND COMPANY, EAST CHERRY VALLEY WATER AND SANITATION DISTRICT, ADOLPH COORS COMPANY,

Petitioners,

vs.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, ET AL.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF COLORADO

This Brief is submitted in support of the petition herein by the Town of Castle Rock, (herein "Castle Rock") and F.B. Rooke & Sons, (herein "Rooke"), Respondents here, and Appellees below.

Castle Rock is a Colorado municipality about 20 miles south of Denver, which relies upon "nontributary ground water", outside a "designated ground water basin" for a significant amount of its municipal water supply.

F.B. Rooke & Sons is a landowner of ranching properties in Pueblo and Huerfano Counties, Colorado. These Respondents are in the same position as many other par-

ties to this proceeding, and do not have economic incentives, by themselves, to come before the Supreme Court on this issue but who can afford to, and hereby do, support those who have done so.

Castle Rock and Rooke fully support and adopt as their own, the Statement of Questions Presented and Reasons for Granting the Writ set out in the Petition herein, and support the Petition herein filed on February 6, 1984.

Castle Rock and Rooke wish to emphasize the magnitude of inequity if the decision below is not considered by the Supreme Court. Between them they own, or include within their respective boundaries, in a semi-arid environment, over 5,000 and 10,000 acres of land, respectively, which may overlie (estimated) at least 3,000 to 6,000 acre-feet per year of production, respectively. The legal right to a reliable source of supply of water in Colorado is worth between $2,000 and $6,000 per acre-foot in the fast-growing area of Castle Rock, and between $1,000 and $3,000 per acre-foot in the area of Rooke's property. The monetary impact of the decision below therefore may be (at least) Six Million Dollars to Castle Rock and to Rooke, each.

As can be observed from the Opinion (*State of Colorado v. Southwestern Colorado Water Conservation District*, 671 P.2d 1294, Colo. Supreme Court, 1983), the trial judge did not disturb the prior general understanding of landowners and appropriators. *But* the Colorado Supreme Court *did*. (See for example the discussion at headnote 5, 671 P.2d pages 1316 through 1319). To say that this ruling came as a surprise to people who thought

they had property rights is an extreme understatement and a distortion of the prior reasonable interpretation of *all* the prior Colorado cases cited and quoted in the Opinion and the footnotes. It truly "upset the apple cart". Where may a person turn when his rights, which he reasonably believed to be *property,* are wiped out? Only to a higher authority.

The opinion sought to be reviewed says, at 671 P.2d 1316, that:

> Second, and more importantly, we believe that, given the state's plenary control over development of water law, the traditional property concept of fee ownership is of limited usefulness as applied to nontributary ground water and serves to mislead rather than to advance understanding in considering public and private rights to utilization of this unique resource.

If that reasoning is extended to all "traditional property concepts", what is left? *Nothing.* There is not *one* "traditional property concept" which could not be banished by a legitimate judicial finding that it is of "limited usefulness" in considering "public and private rights" to utilization of the property (always a "unique resource").

Please review what has happened to Colorado property (water) law.

Castle Rock and Rooke join in the Petition for Certiorari and all supporting documents, and data, and in other support therefor.

Castle Rock and Rooke were represented below by counsel who has drafted this Brief, but who is not a member of the bar of the Supreme Court of the United States,

and who has asked the undersigned member of said bar to sign as "Counsel of Record" for that reason.

Respectfully submitted,

Counsel of Record:

ROBERT W. JOHNSON
1528 North Tejon Street
Colorado Springs, Colorado 80907
Telephone: (303) 635-5181

Counsel in Colorado Supreme Court:

M. E. MACDOUGALL
GEDDES, MACDOUGALL, GEDDES & PAXTON, P.C.
530 South Nevada Avenue
Colorado Springs, Colorado 80903
Telephone: (303) 475-7090

February 24, 1984

Office - Supreme Court, U.S
FILED
FEB 24 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EDWARD T. YOUNG, JR., WILLOW WATER DISTRICT, SOUTH CHERRY CREEK LAND COMPANY, SMOKEY HILLS LAND COMPANY, EAST CHERRY VALLEY WATER AND SANITATION DISTRICT, ADOLPH COORS COMPANY,

Petitioners,

v.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, *et al.*,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF COLORADO

KENNETH BALCOMB
DELANEY & BALCOMB, P.C.
P.O. Drawer 790
Glenwood Springs, CO 81602
(303) 945-6546

February 24, 1984

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI	1

TABLE OF AUTHORITIES

CASES:	Page
Andrus v. *Charlestone Products Co.*, 436 U.S. 604 (1978)	2
Borax, Ltd. v. *Los Angeles*, 296 U.S. 10 (1935)	4
Hughes v. *Washington*, 389 U.S. 290 (1967)	4
Leo Sheep Co. v. *U.S.*, 440 U.S. 668 (1979)	5
United States v. *Union Pacific Ry.*, 353 U.S. 112 (1957)	4
Watt v. *Western Nuclear, Inc.*, ___ U.S. ___, 76 L.Ed2d 400, 103 S. Ct. 2218 (1983)	4
Whitten v. *Coit*, 153 Colo. 157, 385 P.2d 131 (1963)	3
CONSTITUTION OF THE UNITED STATES:	
Article V	4
Article XIV (Sec. 1)	4
STATUTES:	
Act of 1866, ch. 262 § 9, 14 Stat. 253 (currently codified at 30 U.S.C. § 51)	2, 3, 4
Desert Land Act of 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. § 321)	2, 3, 4
28 U.S.C. 1257	3
Sec. 1	3
Sec. 2	4
Sec. 3	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1310

EDWARD T. YOUNG, JR., WILLOW WATER DISTRICT, SOUTH CHERRY CREEK LAND COMPANY, SMOKEY HILLS LAND COMPANY, EAST CHERRY VALLEY WATER AND SANITATION DISTRICT, ADOLPH COORS COMPANY,

Petitioners,

v.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, *et al.*,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF COLORADO

This brief is submitted in support of the petition herein by Glen Schmidt, Betty Jo Schmidt, Jack E. Schmidt, Benton Land and Livestock Company, Merril Hastings, Ben Wurtsmith, Stone Creek Company, Grouse Mountain at Vail, Ltd., Eagle-Vail Metropolitan District, Benchmark at Beaver Creek, Avon Metropolitan District, Fred Green and Leonard Horn,[1] respondents here, and appellees and cross-appellants below. All are land-

[1] None of the named corporations have either a parent or a subsidiary other than wholly owned.

owners in the State of Colorado deriving title, by mesne conveyances, from the United States of America by land patents. Those patents have no reservation of waters, either tributary or nontributary, except as set out in the laws under which such patents were issued.[2]

The Statement of Questions Presented and Reasons for Granting the Writ set out in the Petition herein, are adopted by these respondents in their entirety.

1. While all of these respondents are fee owners of lands, some are such owners of lands in Routt and Eagle Counties, Colorado, overlying underground aquifers known as the Burns Basin. According to the applications for underground nontributary water rights made in the trial courts below by the Nedlog Technology Group (Nedlog) for Burns Basin nontributary underground water, the aquifers underlie an extensive area including all or parts of four north central Colorado counties, including Routt and Eagle Counties.[3] The aquifers were there said to contain or store some 20,000,000 acre feet of recoverable water (App. 41).

Nedlog alleged it had entered into contracts with overlying property owners of the Burns Basin to produce the underlying nontributary water, paying the overlying owner a royalty thereon through the means of a percen-

---

[2] Though each specific title has not been examined it is believed that in most cases such patents issued under either the Act of 1866, 14 Stat. 253, or the Desert Land Act of 1877, 19 Stat. 377. Reference is made to the Petition herein at pp. 10-11 as to the language of such Acts relating to water. Some may also contain under later laws a reservation of certain or all minerals, but not water. Accord, *Andrus* v. *Charlestone Products Co.*, 436 U.S. 604 (1978).

[3] Approximately 70% of the land area was there said to be in federal ownership.

tage of the water so produced (App. 41-43). The respondents here appearing have not entered into such contracts, but if petitioners' arguments are correct, their right to so do has effectively been denied by the opinion and judgment below. It seems apparent that the referenced contracts were made in reliance on the doctrine of private ownership of nontributary water expressed in *Whitten* v. *Coit*, 153 Colo. 157, 385 P.2d 131 (1963). Consequently, some of these respondents, with knowledge of the Burns Basin aquifers, find themselves directly affected by the decision below as to all three questions presented by the petition herein.

2. As argued in the petition, the court below ruled that the overlying landowner never had a property interest in the nontributary ground water, despite its earlier contrary conclusion in *Whitten*, *supra*. To do so, it misconstrued federal statutes and ignored federal common law.[4] The result, it is submitted, is to take property without just compensation. This is a substantial federal question.

Title 28 U.S.C. § 1257, in addition to providing for a writ of certiorari in subsection (3), by subsection (1)[5] and

---

[4] To buttress its conclusion that underground nontributary water had been separated from the land by the Act of 1866 and the Desert Land Act of 1877, the court below adverted to the doctrine "that land grants are construed favorably to the [Federal] government . . ." (App. 98). The cases cited (*United States* v. *Union Pacific Ry.*, 353 U.S. 112 (1957) and *Watt* v. *Western Nuclear, Inc.*, ___ U.S. ___, 76 L.Ed2d 400, 103 S. Ct. ___ (1983)) do not deserve that reliance since they are not appropos the situation here. Both cases involve a determination as to "minerals" (*See* n. 2). There is no uncertainty or ambiguity as to what water was separated from the land in either of the two Acts above mentioned or federal common law.

[5] By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

subsection (2)[6] provide for appeal to this Court. It can be argued the decision below makes invalid the attempt by the United States under the Acts of 1866 and 1877 and federal common law to convey by its patents the water in the soil (nontributary) just as effectively as it thereby conveys all other interests in the patented lands.[7] The decision can therefore be said to be appealable under (1) *supra*. So also it can be argued that the decision (with like force and effect as a statute) is repugnant to the Constitution of the United States (Articles V and XIV, Sec. 1). The decision can therefore be said to be appealable under (2) *supra*.

While *Hughes* v. *Washington*, 389 U.S. 290 (1967), relied on so strongly by petitioners here came to this Court by writ of certiorari, the Court found that federal law governs. Quoting from *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935), this Court in *Hughes* said:

> . . . [t]he question as to the extent of this federal grant, that is, as to the limit of the land conveyed . . . is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law . . .

While petitioners unquestionably have reasons for choosing certiorari rather than appeal, a judgment not here questioned, the fact that the case may have been

---

[6] By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

[7] Subject, of course, to appropriate reservations and exceptions directed by the law under which patent issued.

appealable as raising substantial questions of constitutional, statutory and federal common law[4] would appear strongly to support the granting of the within petition for writ of certiorari.

Accordingly, these respondents pray that the writ of certiorari be granted.

Respectfully submitted,

KENNETH BALCOMB
DELANEY & BALCOMB, P.C.
P.O. Drawer 790
Glenwood Springs, CO 81602
(303) 945-6546

February 24, 1984

---

[4] In considering cases from this Court, greater consideration should have been given by the court below to the language in *Leo Sheep Co.* v. *U.S.*, 440 U.S. 668, 687 (1979) as follows: "Generations of land patents have issued without any express reservation of the right now claimed by the Government."

Office - Supreme Court, U.S.
FILED
APR 2 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1310

In The
Supreme Court of the United States
October Term, 1983

EDWARD T. YOUNG, JR., et al.,
Petitioners,

vs.

SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GLENN G. SAUNDERS
MELVIN B. SABEY
DEBORAH L. FREEMAN
of SAUNDERS, SNYDER, ROSS & DICKSON, P.C.

303 East Seventeenth Avenue
Denver, Colorado 80203
(303) 861-8200

Attorneys for Petitioners

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102
(800) 835-7427 Ext. 333

TABLE OF CONTENTS

	Pages
TABLE OF AUTHORITIES	i
CONSTITUTIONAL AND STATUTORY PROVISIONS	iv
SUMMARY OF THE ARGUMENT	1
ARGUMENT:	
I. A court-made change in state law which abolishes private ownership of property constitutes a "taking" prohibited by the federal constitution.	2
II. Petitioners' view is consistent with long settled legal expectations established under federal and Colorado law.	5
A. Federal legislative and judicial authorities establish that patents to land from the federal government conveyed nontributary ground water as part of the land in which such water was found.	5
B. *Whitten v. Coit* unequivocally confirmed as Colorado law that ownership of nontributary ground water is vested in the overlying landowner.	10
III. The *Huston* decision violates the Contract Clause.	9
IV. The *Huston* decision has unconstitutionally taken from the United States government the nontributary ground water underlying federal land.	10
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:

Andrus v. Charlestone Stone Products Company, 436 U.S. 604 (1978)	6
Baeth v. Hoisveen, 157 N.W.2d 728 (N.D. 1968)	3

TABLE OF AUTHORITIES—Continued

Pages

Baumann v. Smrha, 145 F.Supp. 617 (D. Kan.), aff'd, 352 U.S. 863 (1956) ——— 3, 4

Bonelli Cattle Co. v. State, 414 U.S. 313 (1973), rev'd, Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) ——— 2, 10

Comstock v. Ramsay, 55 Colo. 244, 133 P. 1107 (1913) ——— 7

Douglass v. Pike County, 101 U.S. 677 (1879) ——— 9

Hughes v. State, 389 U.S. 290 (1967) ——— 1, 4, 10

Munn v. State, 94 U.S. 113 (1876) ——— 2

Safranek v. Town of Limon, 123 Colo. 330, 228 P.2d 975 (1951) ——— 8

State v. Southwestern Colorado Water Conservancy District, 671 P.2d 1294 (Colo. 1983) ("Huston") ——— 1, 2, 5, 6, 7, 9, 10

Stonewall Estates v. CF&I Steel Corp., 197 Colo. 255, 592 P.2d 1318 (1979) ——— 8

Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 638 P.2d 1324 (1981), appeal dismissed, 457 U.S. 1101 (1982) ——— 3

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) ——— 6

United States v. Union Pacific Railroad Co., 353 U.S. 112 (1957) ——— 5

Whitten v. Coit, 153 Colo. 157, 385 P.2d 131 (1963) ——— 1, 4, 7, 8, 10

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. V ——— 4

U.S. CONST. amend. XIV, sec. 1 ——— 4

TABLE OF AUTHORITIES—Continued

	Pages
U.S. CONST. art. I, sec. 10	9
COLO. CONST. art. XVI, sec. 5	7
STATUTES:	
Act of July 26, 1866, ch. 262, sec. 9, 14 Stat. 251, 253 (codified at 30 U.S.C. § 51)	6
Act of July 9, 1870, ch. 235, sec. 17, 16 Stat. 217, 218 (codified at 30 U.S.C. § 52)	6
Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§ 321-29)	6
Colo. Rev. Stat. 37-82-101(1)	9
Colo. Rev. Stat. 37-90-103(6)	8
Colo. Rev. Stat. 37-90-137	8
Colo. Rev. Stat. 37-90-137(4)	9

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are cited in the Table of Authorities, *supra*. The text of such provisions is reproduced in the Appendices of the Petition and of the State's Brief in Opposition thereto.

SUMMARY OF THE ARGUMENT

The essence of the State's Brief in Opposition is set forth in a single sentence at page 2:

> Numerous decisions of this Court have held that a state may change common law rules with respect to use and control of underground water, and such a change does not effect a taking of private property without just compensation.

Every case cited by the State in support of its position is inapplicable for one or both of the following reasons:

(1) The right at issue was a right to use *publici juris* water as contrasted with a vested property right;

(2) The court specifically found that there had not been a change in the state's water law doctrines.

In contrast to the law in other jurisdictions where riparian rights, surface water rights, or rights to the use of percolating or other forms of ground water are usufructuary in nature, in Colorado nontributary ground water is vested private property, not an inchoate right dependent upon capture or use. *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963). Unlike courts in some of the jurisdictions cited by the State which followed previously determined rules of property law, the Colorado Court in *State v. Southwestern Colorado Water Conservancy District (Huston)*, 671 P.2d 1294 (Colo. 1983), openly repudiated its former property doctrine.

The impact of the doctrinal change effected by the *Huston* decision upon Petitioners' ownership interests in nontributary ground water is indistinguishable from the taking of tidelands property resulting from the Washington Supreme Court's decision in *Hughes v. State*, 389 U.S. 290 (1967). Each case created the same result, "effecting a retroactive transformation of private into public property—without paying for the privilege of doing so." 389 U.S. at 297. The constitutional prohibition against

that result is no less valid today than it was when Mr. Justice Stewart first enunciated his warning, nor than it was in 1973 when this Court in *Bonelli Cattle Co. v. State*, 414 U.S. 313, 331, confirmed its constitutional concern, adopting Mr. Justice Stewart's very words.

ARGUMENT

I. A Court-Made Change In State Law Which Abolishes Private Ownership Of Property Constitutes a "Taking" Prohibited By The Federal Constitution

The State contends that "the power of the state to replace rules of common law with statutory or decisional doctrines better suited to changing conditions and the public interest cannot . . . be denied." Brief in Opposition, at 4. Such contention is incorrect insofar as it is taken to imply that states' actions in reversing former decisions and embracing new property law doctrines are somehow immune from the federal constitutional constraint that private property cannot be taken for public use without just compensation. *See Munn v. State*, 94 U.S. 113, 134 (1876) ("Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed . . . unless prevented by constitutional limitations.") The new property ownership doctrine articulated by the Colorado Supreme Court in *Huston*, which retroactively transformed privately owned nontributary ground water into public property, clearly transcends the bounds of permissible changes in state decisional doctrines and violates the federal constitutional prohibition against the taking of private property without compensation.

The cases from other jurisdictions cited by the State as exemplifying instances where states have chosen to apply the appropriation doctrine to ground water as well as to

surface water, *see* Brief in Opposition, at 4-5, involved no attempt by a court or legislature to modify vested property rights in water. Those cases concerned a state's substitution of the doctrine of prior appropriation for common law rules by which right to the *use* of water—but no proprietary interest in the corpus of the water itself prior to use—had been recognized. Under such circumstances, there was no ownership of the unused water underlying a landowner's property which could have been affected by the state's substitution of water rights doctrines.

In *Baeth v. Hoisveen*, 157 N.W.2d 728 (N.D. 1968), for example, landowners brought a declaratory judgment action asking that the state ground water act be construed so as not to interfere with their rights to the tributary water underlying their lands. The Court responded:

> [T]here is no absolute ownership of ground water underlying that land which has not actually been diverted and applied to a beneficial use.
>
> • • •
>
> Because the "vested right" which the Plaintiff in the instant case claims is, in reality, a usufructuary right, and its existence is contingent upon application of the underlying water to beneficial use, the legislative exercise of power embodied in Section 61-01-01, N.D.C.C., does not "expropriate" any "vested right" of the plaintiff.

157 N.W.2d at 731-33.

At page 5 of its Brief in Opposition, the State cites *Baumann v. Smrha*, 145 F. Supp. 617 (D. Kan.), *aff'd*, 352 U.S. 863 (1956), suggesting that this Court had sanctioned a clear overruling of previous property doctrines in spite of a resulting deprivation of property. *Baumann* is inapposite on two grounds:

(1) That case did not involve vested property rights. The Court stated:

> [W]e do not regard a landowner as having a vested right in underground waters underlying his land which he has not appropriated and applied to beneficial use.

145 F. Supp. at 624-25. The Court specificially declared that any change in state law could not impair existing vested rights. *Id.*

(2) The federal court in *Baumann* merely followed the Kansas Court's latest pronouncement without finding, as the State suggests, that it had changed the previous law. Noting that the Kansas Court's latest decision would have the effect of overruling earlier cases, the *Baumann* Court declared its intent to follow that decision. "Whether such a change in the law of Kansas is contrary to earlier decisions of the Supreme Court of Kansas . . . .", 145 F. Supp. at 625, was an issue which the Court did not resolve.

The property *ownership* pronouncement in *Whitten* concerning nontributary ground water in Colorado stands in sharp contrast to the state law involved in the above cases, under which only inchoate rights to the *use* of particular waters were recognized.

> The landowner has *property* in the *water in his soil.* It is a vested right which cannot be taken away by mere legislation.

153 Colo. at 173-74, 385 P.2d at 140 (emphasis added). The landowner's proprietary interest in the corpus of underlying nontributary ground water in Colorado is absolutely vested by virtue of overlying land ownership, and is not dependent upon or limited by application of the water to beneficial use. As such, Petitioners' ownership interests in nontributary ground water, akin to the interests in accreted lands of owners of oceanfront property involved in *Hughes v. State,* are protected against taking by the fifth and fourteenth amendemnts to the federal constitution. The State's attempted analogy to permissible changes

in state law impacting non-vested, inchoate rights to *use* certain waters fails to legitimize the clear taking which has resulted from the Colorado Supreme Court's Opinion in *Huston*, effecting a retroactive transformation of private property into public property.

II. Petitioners' View Is Consistent With Long Settled Legal Expectations Established Under Federal And Colorado Law.

A. Federal legislative and judicial authorities establish that patents to land from the federal government conveyed nontributary ground water as part of the land in which such water was found.

It is the established rule that grants from the federal government are construed in favor of the government, that "nothing passes except what is conveyed in clear language", and that "if there are doubts they are resolved for the [g]overnment, not against it." *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 116 (1957). The State has failed to demonstrate any such clear expression of Congressional intent that the United States has separated the title to its nontributary ground water from that of its land.

In reaching for language to support its position that nontributary ground water was severed from the realty when the latter was patented to private parties, the State relies upon a sentence from the voluminous Congressional Record regarding the McCarran Amendment, that "the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof." Brief in Opposition, at 8. The sentence quoted by the State, which appears on page 121 of the Senate Report, is the only place in the very extensive Congressional Record on the McCarran Amendment that we find any reference to water beneath

the surface of the ground, and necessarily relates to tributary ground water since every other reference to water in the reports and testimony is to the adjudication of the waters of surface streams and the obligation of the United States to participate therein the same as any other appropriator.

The State also attempts to make *Andrus v. Charlestone Stone Products Company*, 436 U.S. 604 (1978), pertinent to a determination of the property status of nontributary ground water in Colorado. Brief in Opposition, at 9. The *Andrus* case involved the sole issue of "whether water [was] a 'valuable mineral' as those words were used in the Mining Law." 436 U.S. at 605. Any pronouncement of the *Andrus* court was *obiter dictum* with respect to the issues here involved. Moreover, the policy considerations weighing against a conclusion that ground water could be claimed under the mining laws — the problems which would arise from the fact of having two overlapping systems for the acquisition of private water rights — are of no relevance here, where federal and Colorado laws are entirely consistent in recognizing the landowner's ownership of the nontributary ground water beneath his property.

The early Congressional Acts relied upon by the Colorado Supreme Court in *Huston* and cited by the State as effecting a severance of nontributary ground water from the land refer only to waters in or tributary to natural surface streams. *See* Petiton for Writ of Certiorari, at 10-11. At the time of the enactment of the Acts of 1866, 1870 and 1877, deep nontributary aquifers were not recognized as a viable source of water supply. In view of the actual language chosen by Congress in the subject Acts, the recognized rule that Congressional legislation must be interpreted in the light of then existing facts, *see United*

States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690, 706 (1898), and the rule that nothing passes from the federal government except that which is conveyed in clear language, it can only be concluded that the title of the United States to the nontributary ground water underlying the public domain was not the subject of, or diminished by, the Acts of Congress concerning waters in or tributary to natural surface streams.

B. Whitten v. Coit unequivocally confirmed as Colorado law that ownership of nontributary ground water is vested in the overlying landowner.

The Colorado Supreme Court's attempt in *Huston* to dismiss the definitive property ownership pronouncement in *Whitten* as mere *dictum* is understandable, in view of its controlling effect upon the federal constitutional issues here involved. As evidenced in the State's Brief at pages 13-14, however, such position is untenable: While conceding that *Whitten* concerned the question of whether certain nontributary ground water was subject to appropriation, the State contends that the issue of private versus public ownership of such water was irrelevant to the Court's holding. The very basis for the holding was that such water could not be appropriated out of Colorado's constitutionally defined "water of every natural stream . . . dedicated to the use of the people of the state" because it was privately owned. *See* COLO. CONST. art. XVI, sec. 5.

Nor is the State's attempt to sweep *Whitten* under the rug, by citation to judicial and legislative authorities from years prior or subsequent to *Whitten*, successful. Colorado cases decided in years preceding *Whitten* and concerning other than nontributary ground water, *see, e.g., Comstock v. Ramsay*, 55 Colo. 244, 133 P. 1107 (1913);

Safranek v. Town of Limon, 123 Colo. 330, 228 P.2d 975 (1951); *see generally* Brief in Opposition, at 10-11, simply can not detract from the clear import of *Whitten*. In years subsequent to *Whitten*, the only decisions concerning ownership of the nontributary ground water involved herein have recognized the law of ownership of such water consistent with the decision of *Whitten*. *See Stonewall Estates v. CF&I Steel Corp.*, 197 Colo. 255, 258, 592 P.2d 1318, 1320 (1979).

The State's contention that "[t]he Colorado General Assembly quickly rejected any notion that *Whitten* might have created a common law ownership right in the overlying landowner," Brief in Opposition, at 14, is similarly unpersuasive. The State refers to three provisions of Colorado water statutes in support of its position. The State's discussion of section 37-90-103(6) fails to disclose that the present definition of "designated ground water" does "not include any ground water within the Dawson-Arkose, Denver, Arapahoe, or Laramie-Fox Hills formation located outside the boundaries of any designated ground water basin that was in existence on January 1, 1983." C.R.S. 37-90-103(6) (as amended, L.1983, p.1414, §1). The practical effect of such language is to exempt from the modified appropriation doctrine established under the 1965 Act the major nontributary formations which might intersect the designated basins.[1]

The State also points out that C.R.S. 37-90-137, as amended, requires a permit to construct a well outside the boundaries of designated ground water basins, and provides protection for existing users of such water while "limiting the class of persons entitled to use [it]." Brief

---

[1]No case has upheld the 1965 Ground Water Management Act against a challenge that it effects a taking of private property in violation of the federal constitution.

in Opposition, at 14. In so doing, the State again leaves undisclosed the critical fact — that the class of persons entitled to use nontributary water is limited to those who own the overlying land or have the consent of the overlying landowner. The statutory provision containing that limitation, C.R.S. 37-90-137(4), is the *only* declaration of the legislature directly controlling the Petitioners' nontributary water. That provision supports, rather than refutes, their claim of ownership.

Finally, the State references C.R.S. 37-82-101(1) (Supp. 1983). Brief in Opposition, at 15. This provision clearly leaves the property right in nontributary water in the overlying landowner until he releases such water from his dominion.

III. The Huston Decision Violates The Contract Clause.

In *Douglass v. Pike County,* 101 U.S. 677, 687 (1879), this Court stated the well recognized rule that:

> After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.

As Petitioners have previously shown, the Opinion of the Colorado Supreme Court in *Huston* violates Article 1, Section 10 of the Constitution of the United States because it interprets the settled federal and state statutory scheme in an entirely new way, so as to destroy the landowner's right of ownership of underlying nontributary ground water which has been conveyed to purchasers of the overlying land. This novel construction impairs the very substance upon which purchasers and sellers have bargained with each other in contracts for the conveyance of land in Colorado.

IV. The Huston Decision Has Unconstitutionally Taken From The United States Government the Nontributary Ground Water Underlying Federal Land.

In Part IV of the State's Brief in Opposition, the State suggests that the United States must now resort to the federal reserved rights doctrine, with all its limitations, to acquire rights to use water, the title of which it has never relinquished. The State can show no action of the federal government by which it affirmatively divested itself of that property. Even if the various Acts relied upon by the State had severed the water from the land, subject to disposition by state law, *Whitten* declared that in Colorado the landowner owns the nontributary ground water underlying his property. That declaration was not limited to private citizens, but applies with equal force to the federal government. The Colorado Supreme Court's *Huston* decision has thus unconstitutionally taken vested rights of the United States government in the nontributary ground water underlying public domain lands in Colorado, forcing it to resort to the reserved rights doctrine to regain that property.

CONCLUSION

In the *Bonelli* case, this Court issued a warning, quoting the language of the *Hughes* concurrence, against a state's retroactive transformation of private into public property through changes in decisional property ownership doctrines. This case raises the same constitutional concerns more squarely than has any case in this decade. Review of this case by the Court, after thorough briefing and argument, is imperative in order to clarify the constitutional viability of the *Hughes* concurrence.

FOR THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

By Glenn G. Saunders
Melvin B. Sabey
Deborah L. Freeman
of Saunders, Snyder, Ross
& Dickson, P.C.
303 East Seventeenth Avenue
Denver, Colorado 80203
(303) 861-8200

Attorneys for Petitioners